TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 241.

GLOBE REFINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE LANDA COTTON OIL COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED FEBRUARY 24, 1905.

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1 *Caption.*

THE UNITED STATES OF AMERICA,
Western District of Texas.

At a term of the circuit court of the United States for the fifth circuit and western district of Texas, the Honorable Thomas S. Maxey, United States district judge, presiding, and holding its sessions at San Antonio, Texas, and which term began on the 4th day of November, A. D. 1901, there came on to be heard, amongst other causes pending on the law side of the docket the following cause:

GLOBE REFINING COMPANY
vs.
LANDA COTTON OIL COMPANY. } No. 652.

2 *Plaintiff's First Amended Petition.*

Filed November 18, 1901.

STATE OF TEXAS,
County of Bexar.

In the District Court of the United States for the Western District of Texas, at San Antonio, 1900.

To the Hon. T. S. Maxey, judge of said court:

Your petitioner, The Globe Refining Company, a corporation under the laws of the State of Kentucky and doing business in Kentucky, Texas and other States of the United States of America, being a resident citizen of the State of Kentucky and not of the State of Texas, and complaining of the Landa Cotton Oil Company, a corporation under the laws of the State of Texas, and residing and doing business in the State of Texas, in the county of Comal and within the western district of Texas, whose president and general manager is Harry Landa, who also resides in said county of Comal; and after leave of court having been duly obtained your petitioner files this, its first amended original petition, and for cause, says:

That heretofore on or about the 24th day of July, 1897, the said plaintiff and defendant entered into a contract whereby the defendant agreed to sell and ship to plaintiff's order ten tanks of prime crude cotton-seed oil, at an agreed price then and there made by and between the said parties, being 15¾ cents per gallon, each gallon consisting of 7½ pounds in plaintiff's tanks, free on board cars, at defendant's mill in New Braunfels, Texas, weight and quality of the oil was guaranteed by the defendant, that is to say, it was agreed and understood that the plaintiff being a resident citizen of Louisville, Kentucky, and not of the State of Texas, then or at that time, and the defendant and its mills being located in New Braunfels, Texas, and being a citizen of the western district of Texas, and not of the State of Kentucky, or any other State than Texas, that the plaintiff would

send its cars with tanks thereon to the mills of the defendant and that the defendant would promptly fill them with oil as aforesaid, filling all of the said tanks during the months of August and September, five of said tanks were agreed by the parties thereto
3 to be filled by defendant during the last half of August, 1897, and the other five tanks during the first half of the succeeding month, and the defendant was to bill same to the plaintiff's order to such point or points as the plaintiffs might direct, that is, shipping directions to be furnished by plaintiff; and that at the time of the shipment the defendant should draw sight draft with bills — lading attached for payment. Plaintiff has performed and has been ready to perform his part of the contract at all times.

That in pursuance of and in compliance with the said contract the plaintiff at great expense and trouble sent from time to time its tanks as required by the said agreement to defendant's said mills to have the cars at the said mills for the reception of the said crude oil at the time agreed upon as aforesaid. In order to do this the plaintiff was under the necessity of obligating itself unconditionally to the railroad company (and of which the defendant had notice) to pay to it for the transportation of the cars from said Louisville to said New Braunfels in the sum of nine hundred dollars, which amount it obligated itself to pay and which it was compelled to pay to said railroad companies before the first day of January, 1898, and which amount was paid by reason of its said contract with defendant and defendant's obligation to fill said tanks with oil as aforesaid, and was incurred as an advancement on said oil contract.

That on or about August 26th, 1897 defendant filled and shipped in the manner and form aforesaid under the terms of said contract one tank of the said oil said tank containing 6606⅞ gallons of oil which said oil was received and paid for by the plaintiff and that on the 30th day of August of same year defendant partially filled and shipped another tank of oil, failing, however, and refusing to fill the same as was contemplated by the aforesaid contract and same was by defendant shipped out in violation of the said contract, same being 1153⅛ gallons short, which shortage was unknown to plaintiff for several days thereafter and that on the first day of September of the same year defendant shipped out in accordance with the terms of said contract one other tank of oil but failed and refused ever thereafter to ship or send to plaintiff, or to his order any more oil, but did not notify plaintiff thereof until 14th of September, 1897. That plaintiff paid the full contract price for said three tanks of oil, also paid the railroad company three hundred dollars for transporting plaintiff's said tank cars containing said oil.

4 That defendant refused to further comply with said contract or the terms thereof, thereby again breaching the terms thereof, thus failing and refusing to comply with said contract and agreement and greatly delaying notice thereof, thereby entailing great and heavy loss and inconvenience, trouble and annoyance on plaintiff to his damage in the sum of three thousand five hundred dollars.

That at the time of the breach of the said contract by the defendant, as aforesaid, crude oil of the kind and quality aforesaid, and for which the plaintiff had contracted with the defendant was worth 18¾ cents per gallon, and same was worth 18¾ cents in the market, and it would have cost that much to have replaced same had plaintiff been able to have replaced same in proper time, but by reason of the disorganized condition of the market and defendant's failure to notify plaintiff of said real breach of contract at time of breach, plaintiff was wholly unable to get the oil at all and that at the time that the plaintiff was notified of the breach the oil was worth 20c. per gallon, and thereafter before the bringing of this suit was worth 25c. per gallon. But plaintiff was wholly unable to procure same at all at the time or place of delivery of said oil, or at any time thereafter at said place, although every effort was made to do so, it requiring the plaintiff a number of days to negotiate so as to get other oil necessarily losing much time.

That the defendant contemplated the breach of said contract intending so to do, wrongfully caused, directed and instructed plaintiff to send its tank cars from Louisville, Kentucky to New Braunfels, Texas, a distance of 1000 miles at an expense and loss to plaintiff of $1000, knowing at said time, and during the time said cars were in transit that he would not fill said cars and that plaintiff could not get same filled at any price at said place and knowing that plaintiff would lose the use of said cars unnecessarily, and would lose much valuable time in arranging to procure other oil from other sources, if at all, and knowing that he would not be able to replace the oil that the defendant procured and agreed to furnish as aforesaid, and having full notice from the plaintiff that said oil must and should be furnished plaintiff by the 15th day of September, 1897, defendant having positively agreed to furnish said oil by said 15th day of September, 1897. That the defendant wrongfully cancelled said contract on the 2nd of September, without giving any notice thereof to plaintiff until 14th of September, having determined to do so, and intended to do so before the second day of September, knowing in the meantime and all of the time that plaintiff was forwarding the cars from Louisville to New Braunfels as aforesaid, at great expense and loss of time, and knowing the plaintiff could and would and could take advantage of said two weeks' time to have supplied himself from other sources, and have saved the plaintiff of the great loss attending said breach of contract. That it was the duty of the defendant to have saved plaintiff this loss and notwithstanding, that plaintiff had determined not to fill plaintiff's tank cars with oil he deliberately had plaintiff to send them on from said Louisville to New Braunfels and at no time did he countermand said directions but induced plaintiff to incur said expense unnecessarily. That plaintiff did so wilfully and maliciously, causing the loss already stated, which was an unnecessary loss to plaintiff of two thousand dollars which plaintiff could and would have saved had the defendant notified the plaintiff of its said wrongful intention to violate said contract at or near the time it determined so to do. That defendant had full notice that the plaintiff relied on it to fur-

nish said oil by the 15th of September and had full knowledge that the plaintiff could not procure the same from any other source and well knew that the plaintiff would suffer the losses herein set up if it did breach said contract in the manner herein charged, wherefore the defendant became liable and bound to pay said damage herein set up.

That each of the said ten tanks to be shipped to defendant by plaintiff as hereinbefore stated had a capacity of holding about 6700 gallons each and when filled as they should have been by the defendant would have required 6700 gallons each of oil as aforesaid, that is to say the defendant fell short in the amount of the oil he should have shipped to plaintiff (including said 1153⅓ gallons) as contracted for as hereinbefore stated in the amount of 48053⅓ gallons, reasonably worth 18¾ cents per gallon at the time of said breach as hereinbefore stated and worth 20c. per gallon*g* when plaintiff was informed thereof.

That by reason of said breach of contract by defendant plaintiff has lost the use of his said tanks by reason of defendant not informing him of his intention to fill said tanks for a period of at least thirty days each reasonably worth three dollars each per day, whereplaintiff is damaged in the further sum of $700.00. Plaintiff further says that time was of the essence of the contract in this that

6 the defendant by the terms of his contract was to fill at least five of the tanks with oil by the first of August, 1897, when in truth and in fact it only filled three of them, although the plaintiff had the emp*l*ty tanks for the reception of said oil on hand and ready to be filled and in every way complied with the terms of its said agreement; and that it expected and had arranged and had contracted with the defendant to that effect, and had arranged with its own customers to furnish the said seven tanks of oil within a certain period of time, which contemplated the sharp compliance by defendant with said contract all of which facts as above stated *was* well known to the defendant, and defendant had contracted to that end with the plaintiff, and if the defendant had so complied with the terms of said agreement plaintiff would have been able to have furnished its said customers with the oil aforesaid but plaintiff failed to meet its obligations to its customers by said failure of defendant to deliver in said time said tanks, and it was too late to fill plaintiff's orders and contracts after defendant's notice and failure of refusal to deliver said oil, whereby it was subjected to the he-vy damage and loss of $740, thereby losing said customers and contracts, and suffering the loss of its credit and reputation to its damage in the further sum of $1,000.

Plaintiff further alleges that in asking for the shipment of said oil, plaintiff was under the necessity of arranging to send and sending at great expense its tanks from distant points, the defendant's said mills to receive said oil, all of which was well known to defendant, and in contemplation of the aforesaid contract, and — was well understood by both plaintiff and defendant that at the time of making and entering into said contract that plaintiff was required to pay *pay* additional freight in order to rearrange the destination of the

various tanks and other points; that the additional rate of freight that the plaintiff was under the necessity of paying and which it had to pay by reason of the breach of the aforesaid contract upon part of the plaintiff and which was the necessary and proximate loss and expense incurred thereby, was the sum of $350.00. That said expense was brought about by the unwarranted failure upon the part of the defendant to carry out its said contract as hereinbefore stated and that the said planning and expense incurred in the moving of said cars holding said tanks to meet the emergencies and to reach other points to be filled were unavoidably incurred and for all of which the defendant became liable and bound to pay. Plaintiff further says that it sent its cars with said tanks to the mills of defendant and for such oil as was furnished it giving at all
7 times such instructions as were necessary and required for the shipping of said oil and in every way complied with its contract, and held itself ready to comply with any and all provisions thereof, all of which was well known to defendant, but it without legal cause refused compliance as aforesaid.

That by reason of making the said contract the defendant became bound to a strict performance of same. It became bound to fill the tanks of plaintiff as agreed upon and by so doing it was the intention of said parties to fill five of them during the month of August 1897, and five during the first half of the month of September, 1897, promptly. And for the defendant's said failure it became liable for the injury and damage that accrued to plaintiff hereinbefore set out.

Wherefore premises considered, plaintiff prays for process against defendant, and it having been cited, it prays for judgment for said damage and costs of suit and general relief.

(Signed) J. D. GUINN,
Attorney for Plaintiff.

Endorsed: No. 652. Globe Refining Company *vs.* Landa Cotton Oil Company. Plaintiff's first amended petition. Filed November 18, 1901. D. H. Hart, clerk.

Plaintiff's First Supplemental Petition.

Filed November 14, 1901.

GLOBE REFINING COMPANY
vs.
LANDA COTTON OIL COMPANY.

Now comes the plaintiff and having obtained leave of court files this its first supplemental petition responding to the defendant's original answer herein and for cause it says:

1. It excepts to the plea in abatement to the jurisdiction herein because same has been waived by reason of fact that it was filed this term of court for first time and this suit was filed more than two years ago and same comes too late and at a time when the

plaintiff would be left without remedy in case the court should find the same to be true, that is, plaintiff's cause of action would be barred by the statutes of limitation and it would be without remedy for the injury and damage caused it by the plaintiff as alleged in the pleadings in this cause. Wherefore said plea should be
8 struck out.

2. It excepts to the same because this court has acquired and has had and held the same with the defendant's consent for the last two years or thereabouts, and such right to plead is waived.

3. And if held to further answer in this cause the plaintiff excepts to that part of the said plea as is set forth in the sixth paragraph thereof because same was and is vague, indefinite and argumentative and does not state a proper cause of damage or any legal measure of damage.

4. And further excepting it excepts to that part of the defendant's answer which charges that the plaintiff cast burdens on the defendant, and set about to impose upon, cheat and defraud the defendant and breached the contract generally by refusing to pay drafts as agreed, and refused to accept the oil, and that plaintiff defrauded the defendant out of services and money because same is vague and indefinite and does not state the facts with sufficient certainty to authorize the proof of the charge of fraud.

5. It excepts to that part of the defendant's answer which sets up that the tank cars were dirty, etc., because same does not set up facts which authorize defendant to cancel contract and same is irrelevant.

6. Plaintiff excepts to the sixth paragraph of the defendant's answer and moves to strike that part of the same out which begins "at that time the car was in a far-distant State, etc." continuing on to the end of said paragraph because same is argumentative, supposable matter, improper conclusions for pleading and is not legitimate.

7. Plaintiff excepts further to the seventh paragraph of the defendant's answer because the same does not state facts as contradistinguished from fancy and conclusions and argument, and is not legitimate pleading.

Of all of the above the plaintiff asks judgment of the court.

(Signed) J. D. GUINN,
Attorney for Plaintiff.

And if held to further answer, the plaintiff says that the facts set up in the plea to the jurisdiction, and also as to the merits of the case are untrue, and plaintiff denies all of the allegations separately.

And specially answering the defendant's first count wherein it is claimed that the *defendant* sent a statement to the defendant of date December 6th, 1897, claiming only $710.30 is untrue. It says further that the proposed settlement at said time was in the
9 nature of a compromise and is not proper to be considered in this trial. Same was sent because at said date the price of oil was declining, and because of its knowledge of the expense of a law-

suit in a foreign State, and the disadvantage and expense to which it would be put. Besides, said bill did not present plaintiff's legal claim for damages, nor his loss as by law he was entitled to claim as damages, and defendant did not accept said proposition because of his supposed advantage over plaintiff, wherefore plaintiff is in no manner bound by said proposition. That the freight charges referred to in said bill for which the defendant is liable is the full sum of $388.72, for which sum the plaintiff asks judgment.

Plaintiff denies all and singular all of the allegation- of whatsoever nature contained in said answer.

And further answering plaintiff says it furnished cars clean when leaving destination as is usual in said business and in case defendant ever had to clean them he made no complaint of it being a cause for cancelling the contract, at least not to plaintiff's knowledge.

That the matters and things set up *are* breaches of said contract as stated by the defendant in said answer are whimsical, visionary, uncalled for and untrue. That all that the plaintiff even did in regard to the contract was to call the defendant's attention to the terms of the contract and asked him to observe same. That on or about the second day of September on arrival of the bill of lading for the second tank car shipped by the defendant under the said contract, same was accompanied by an advanced charge of $32.00 not proper to be attached to the same, requiring the plaintiff to pay the same before it could get the possession of the shipment and same was in violation of the contract, and plaintiff not knowing what it was for, telegraphed the defendant in effect to correct said $32 and draft would be paid. Defendant promptly telegraphed the same day for plaintiff to pay the $32 and that matters would be adjusted afterwards. Thereupon plaintiff did at once pay the same as well as the draft for the oil. Plaintiff upon finding what it was for, agreed to arrange the same, and agreed with defendant to do so as soon as it found what it was for. Defendant knew what it was for and had no right to have it sent along without at least explaining what it was for. That on another occasion about the 31st day of August, 1897, defendant in violation of said contract, sent draft to it payable "on demand" when same should have been "at sight." Plaintiff paid this, but wrote to the defendant to make other drafts in accordance with the contract, which defendant admitted at once to be correct.

That on or about Aug. 31st, 1897, defendant, in violation of said contract, instead of filling and shipping car No. 14 full of oil negligently and carelessly and in violation of the contract shipped the same only about three-fourths filled, being short nearly 12,000 pounds, as is further set forth in plaintiff's original petition herein. This fact the defendant was aware of and wrote plaintiff of the circumstances appertaining to the negligence and admitting the same. Plaintiff replying to same of date September 2, 1897, stated in effect that it would be charged up with full freight as though it was full, and plaintiff believed that defendant would pay the difference when the amount was ascertained.

Defendant was promptly and fully advised as to its telegram re-

garding the advance charges, and why it wished to pay drafts on sight instead of on demand, which was an item to the plaintiff. And defendant with full knowledge of this and acquiescing in the same, several days afterwards, on or after the 11th of September, 1897, at a time when the price of oil had advanced from three to four cents per gallon and with prospects for further advance, and when it was to his interest to annull and declare the contract off, (and assigning no tangible reason therefor except plaintiff's conduct with regard to the shortage of the $32 draft, and the matter of the sight draft all of which it had acquiesced in) he did so deliberately, wilfully and fraudulently without any lawful excuse for so doing, reaping all of the advantage of said increased price, and defrauding plaintiff out of them, knowing that he had caused plaintiff to send out its cars, and having had it bound up to pay at least 15¾ cents per gallon, and knowing that plaintiff was at great disadvantage to claim its rights so far from its residence, and at a place where the defendant was very hard to contend with. These are the principal considerations which induced the defendant to violate his contract.

Plaintiff says it has been out of its money for more than four years and same is justly due it, and it claims legal interest thereon from the said 11th day of September, 1897, and prays for same and as in original petition.

(Signed) J. D. GUINN,
Attorney for Plaintiff.

Endorsed: No. 652. Globe Refining Company *vs.* Landa Cotton Oil Company. First supplemental petition. Filed this 14th day of November, 1901. D. H. Hart, clerk, by A. Grosenbacher, deputy.

11 *Amended Original Answer.*

Filed November 12, 1901.

United States Circuit Court, Western District of Texas, at San Antonio.

GLOBE REFINING CO.
vs.
LANDA COTTON OIL CO. } No. 652.

Now comes the defendant, Landa Cotton Oil Co. and with leave of court files this its first amended original answer and demurs to the plaintiff's original petition because the same states no cause of action and of this defendant prays the judgment of the court.

(Signed) DENMAN, FRANKLIN, COBBS & McGOWN AND
F. J. MAIER, *Attorneys for Defendant.*

And if further required to answer defendant excepts to said petition, because it shows upon its face that this court has no jurisdiction, as the amount involved is less than $2,000.00.

2. It excepts to the sufficiency of the petition as to all the items of damage, except the $1441.60 item, because the petition shows that all the said items of damage are included in said $1441.69. Because they are for the same damages in other forms and in other words.

3. Defendant excepts to the sufficiency of the petition as to all items of damage except said $1441.60 item, because the same are insufficient in law, and because the allegation of the petition show that they are not proper grounds for damage and are not proper measures of damage.

4. Defendant excepts to the sufficiency of the petition as to all of the items of damage because they are vague and indefinite.

United States Circuit Court, Western District of Texas, at San Antonio.

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Now comes the defendant The Landa Cotton Oil Co. and says that court has no jurisdiction to try this cause, because the amount in controversy is less than $2,000.00, and the district court of Comal county, Texas, is the proper court in which to try this cause and which has jurisdiction.

That for the fraudulent purpose of giving jurisdiction to this court the plaintiff fraudulently prays for a larger amount than is in dispute between the parties, and alleges damages in larger
12 amounts than they in fact are, even if plaintiff's cause of action is well founded, and also alleges double damage, that is, asks for damages in one count and then in another count in different language asks for the same damages again, for the fraudulent purpose of bringing the cause of action above $2,000.00, and to confer jurisdiction upon this court.

The plaintiffs allege- damages in the amount of $3,500.00, and to make said $3500,00 it gives the following items and fraudulently alleges amounts larger than they actually are as follows:

Plaintiff alleges damage in the sum of $1441.60, as a difference of 3 cts. a gallon on 48053⅓ gallons of oil. When the real difference cannot and does not exceed $710.30: The plaintiff sent a statement to defendant dated Nov. 6, 1897, in which *they* state that said difference is 1½ cents on 47,353⅓ gallons of oil in the amount of $710.30. The plaintiff for said fraudulent purpose alleged the number of gallons and the difference in price to be greater that it in fact is, and greater than plaintiff itself admitted and demanded of the defendant.

In said statement the *defendant* set out the entire claim, which it claims to be due it from defendant, except the freight charges on two cars. The entire claim, as admitted and made out by defendant is $1021.28. The highest freight charges for any two cars is $127.14 and the freight charges on the two cars omitted is no greater. Thus the total claim of plaintiff against defendant, according to plaintiff's own figures is not more than $1148.24.

Plaintiff alleges $700.00 for the service of 7 tank cars. The price of such service is ⅞ cents a mile with a load and *the* nothing for their travel while empty. The distance which said cars travel from New Braunfels, Texas to Louisville is not exceeding 800 miles, making the earning of a car $6.00 a trip, and the 7 cars $42.00. Had the tanks all been filled by defendant as plaintiff claims they should have been the cars would have earned $42.00 and this is the actual value of their service instead of $700.00 as claimed by plaintiff. Plaintiff alleges the time of one car to be worth $3.00 a day, which would be $1095.00 a year. The market value of *a* such a car is little over $500.00. According to plaintiff's allegations, a car would earn about twice its market value in a single year. Which allegations are fraudulent for the purpose of giving this court jurisdiction.

13 The item of $1,000.00 damage for the loss — customers, contracts, and loss of credit and reputation is wholly untrue and was inserted for the fraudulent purpose — bringing plaintiff's demand above $2,000.00. The allegations that defendant knew of the contracts which plaintiff had with customers, is untrue. Defendant knew nothing about plaintiff's affairs except what plaintiff told defendant in their written correspondence, and said correspondence shows plaintiff's allegations to be untrue. That the contract was made with reference to plaintiff's contracts with customers, is also untrue as shown by the contract itself which is in writing. The entire item is fraudulent for the purpose of giving this court jurisdiction.

The item of $350.00 for additional freight rates is also fictitious and fraudulent. The freight rates remained the same after, as well as before said time, and the item is redundant, as it is in fact included in the item for the purchase of other oil.

The above facts the defendant is ready to verify.

(Signed) HARRY LANDA,
Vice-President of The Landa Cotton Oil Co., Defendant.

Subscribed and sworn to by Harry Landa, before me this 30th day of April, A. D. 1900.

(Signed) GEO. F. STEVENS,
[SEAL.] *Notary Public within and for Comal County, Texas.*

Wherefore defendants pray that this court will take no further cognizance of this suit, and that defendant be dismissed with his costs.

(Signed) DENMAN, FRANKLIN, COBBS & McGOWN AND
F. J. MAIER,
Attorneys for Defendant, Landa Cotton Oil Co.

United States Circuit Court, Western District of Texas, at San Antonio.

GLOBE REFINING COMPANY
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And if further required to answer, the defendant says that it denies all and singular the allegations of the plaintiff's pleadings and of this it puts itself upon the country.

(Signed) DENMAN, FRANKLIN, COBBS & McGOWN AND
F. J. MAIER,
Attorneys for Defendant, Landa Cotton Oil Co.

14 1st. And further answering the defendant says that if there was a *a* contract between the plaintiff and defendant (which is not admitted but expressly denied) the same was as follows: That on or about July 30, 1897, the defendant sold to the plaintiff ten tanks of prime crude cotton-seed oil, at 15¾ cents per gallon, a gallon being 7½ pounds, free on board at the defendant's mill, in plaintiff's tank cars. That for the purpose of shipping the said oil, the plaintiff should deliver at defendant's oil mill at New Braunfels, Texas, the proper and necessary tank cars, without any expense or trouble, to the defendant, and that the defendant should place the oil therein without any extra charge for loading; and defendant was to guarantee the weights and quality of the oil. That the defendant was to procure a bill of lading from the railroad company for each tank car of oil, draw a sight draft on the plaintiff at Louisville, Kentucky and attach the same to the bill of lading. The plaintiff was to pay the full amount of the said draft when the same was presented to it for payment and not dishonor the same or permit the same to be protested. Part of the said oil was to be shipped in the last half of August and the balance in the first half of September, 1897. The plaintiff was to furnish shipping instructions to the defendant. The writing which purports to contain the said contract is much abbreviated, but the above is according to the letter, meaning and spirit of the same.

2nd. The defendant was always ready and willing to perform its part of the said contract, and in good faith entered upon the performance of the same. But the plaintiff from the beginning, and as long as the performance of the contract remained in progress, cast burdens upon the defendant entirely foreign to the contract and deliberately set about to impose upon, cheat and defraud the defendant, breached the contract generally by refusing to pay the drafts as it agreed, and refusing to accept some of the oil which defendant shipped to plaintiff; and plaintiff actually succeeded in defrauding the *plaintiff* both out of services and money.

Instead of furnishing tank cars in a fit condition in which to put and ship the oil, plaintiff furnished tank cars which were dirty and filthy on the inside and unfit for use in such condition. Instead of plaintiff cleaning said tanks, it demanded that the defendant should

clean them; which the defendant was obliged to do, in order to have tank cars to proceed with the fulfillment of the contract; which was trouble and expense to defendant.

15 Plaintiff further disregarded its contract by demanding that the defendant should pay freight on part of one of said oil shipments, which was contrary to the letter, spirit and intent of the said contract.

Plaintiff further breached the contract by demanding that the defendant should pay such charges as the railroad companies should make against the plaintiff's tank cars, and which the railroad companies note on the bills of lading which they issue; which was also contrary to the letter, spirit and intent of the said contract.

The plaintiff also breached its contract in this; that after a tank of oil had been loaded and shipped to the plaintiff, far beyond the limits of the State of Texas, the plaintiff refused to accept said oil and refused to pay the draft when the same was presented for payment, which was a breach of the plaintiff's contract in its most material part, as the payment of the said draft was the only consideration which the defendant was to receive for its said oil, and was the most important feature in the said contract which the plaintiff obligated itself to perform. The plaintiff even notified the defendant by telegraph that it would refuse to pay the drafts, unless the defendant would pay certain claims which the railroad companies had against the plaintiff and its tank cars. At that time, the said tank of oil was already in a far-distant State where the defendant could not resell the same, without much trouble and expense. The non-payment of the draft would have caused it to be protested. The draft had already been discounted by a bank, and for said draft to be protested for non-payment would have destroyed the confidence which the banks repose- in the defendant, would cause them to refuse to discount future drafts for defendant and thereby the defendant would be irreparably injured in the future transaction of business; the plaintiff knowing these facts and knowing that the defendant could not afford to have the payment of its drafts refused at any price, took the advantage of these circumstances to extort money from the defendant for the payment of charges which the railroad companies had against the plaintiff and its tank cars, and the plaintiff even had the audacity to notify the defendant of its said action by telegraph. In order to prevent the trouble and expense in reselling the oil in a distant State, and in order to prevent the defendant's credit and good name from being ruined by the dishonor and protest of its draft, and to avoid other resulting injuries the defendant was obliged to comply with the plaintiff's unjust demand. Shortly afterwards, the

16 plaintiff gave the defendant to understand that plaintiff would hold the defendant responsible for the charges which the railroad companies make against the plaintiff's tank cars and that the plaintiff would draw drafts on the defendant for the amount of all such charges which the railroad companies refused to refund, all of which was contrary to and in derrogation of the contract. If the defendant refused to pay the unjust drafts which plaintiff

threatened to draw on defendant, the defendant would still have to suffer all the injuries which resulted from a dishonored and protested draft. Plaintiff, a short time afterwards, sent an account to the defendant, charging the defendant with the claims which the railroads had against the plaintiff, and its tank cars. As the defendant was obliged to promise the payment of said charges in order to prevent the rejection of its shipment of its oil, and to avoid the dishonor and protest of its draft, and in order to prevent the drawing of drafts against the defendant for such charges, cho-sing the least between two evils, the defendant paid the same to the plaintiff.

Defendant further says that plaintiff's conduct clearly showed, that plaintiff had no intention of abiding by its contract in the future. It was evident, and it so appeared to defendant, that the plaintiff would continue to decoy the defendant's oil off into a far-distant State, and that then the plaintiff would refuse to accept the oil and would refuse to pay the drafts, unless the defendant would continue to pay such tribute as the plaintiff would see fit to exact. A failure on the part of the defendant to pay such tribute, would result in the trouble and expense of reselling the oil, in a far-distant State, and would also result in the dishonor and protest of the defendant's drafts, to the injury of the defendant's credit and good business reputation. The only way that the defendant could escape such injuries was to refuse to make any further shipments to the plaintiff.

The defendant further says that as plaintiff had already broken its contract, the same was no longer binding on the defendant, and defendant was under no further obligation thereunder. Especially is this true since the plaintiff showed an intention to break it in the future, and to take advantage of the helpless position of the defendant for the purpose of forcing the defendant to pay unjust demands. Shortly after the plaintiff broke its contract and committed the aforesaid wrongs, the defendant gave the plaintiff notice,
17 that on account of the said breach the contract would be considered at an end and no more oil would be shipped thereunder.

The defendant further says that the allegations in the plaintiff's pleadings, in various forms, which says that the contract required five tanks of oil to be shipped in the month of August is incorrect. That if the plaintiff so understood the contract, the minds of the plaintiff and defendant never met, never agreed to the same thing and there was no contract at all, and the alleged contract is void for want of mutuality. In such event the defendant was not obliged to ship any more oil to plaintiff, as there was no valid contract requiring it to do so. Defendant however says that the contract clearly states that part of the oil should be shipped in the last half of August and the balance in the first half of September, and does not state or mean to state any particular quantity in either month. That the plaintiff wilfully places a false construction upon the contract, and claims that five tanks should have been shipped in August, for the fraudulent purpose of making the court and jury

believe that the defendant first breached its contract; because the plaintiff is desirous of defrauding the defendant in this court, out of what it was unable to defraud in the shipments of the oil.

(Signed) F. J. MAIER,
DENMAN, FRANKLIN & McGOWN,
Att'ys for Defendant.

Endorsed: No. 652. Globe Refining Co. *vs.* Landa Cotton Oil Co. Amended original answer. Filed this 12 day of November, 1901. D. H. Hart, clerk, by A. Grosenbacher, deputy.

18 *Defendant's Exceptions to Plaintiff's First Amended Petition.*

Filed November 18, 1901.

In United States Circuit Court, Western District of Texas, Sitting at San Antonio.

GLOBE REFINING COMPANY
vs.
LANDA COTTON OIL COMPANY. } No. 652.

Now comes defendant and with leave of the court files this its exceptions to plaintiff's first amended petition, filed herein November 18th, 1901, these being the same exceptions presented verbally and now reduced to writing as mentioned in the decree herein and for exception defendant specially excepts to the sufficiency of all that part of said amended petition filed November 18th, 1901, which seeks to recover for freight, trouble and transportation on the tank cars and all that part thereof seeking to recover rent or for the use of said tank cars, and all that part thereof, seeking to recover for loss of customers and contracts, credit and reputation, because the pleadings as to neither of said items stated facts showing any cause of action against defendant, and because as to the latter items, the pleadings did not state that any notice of such special damage was given to defendant at or before the time of making the contract sued upon, and because such special damage cannot be had in addition to the ordinary damage already sought in the petition for the breach.

Wherefore, it prays that said exceptions to said portions of said pleadings be sustained.

Respectfully submitted.

(Signed) DENMAN, FRANKLIN & McGOWN,
F. J. MAIER, *Counsel for Defendant.*

Endorsed: No. 652. In the circuit court of the United States in and for the western district of Texas, at San Antonio. Globe Refining Co. *vs.* Landa Cotton Oil Company. Defendant's exceptions to plaintiff's 1st amended petition. Filed by order of court as of 18th day of November, 1901. D. H. Hart, clerk, by A. Grosenbacher, deputy.

19 *Judgment.*

Entered November 23rd, 1901.

In United States Circuit Court, Western District of Texas, Sitting at San Antonio.

GLOBE REFINING COMPANY
vs.
LANDA COTTON OIL COMPANY. } No. 652.

On this the 11th day of November, 1901, came on to be heard the special demurrers of defendant as set forth in its answer filed herein November 12th, 1901, and the same having been considered by the court, it is of the opinion that they are well taken.

Wherefore, it was ordered, adjudged and decreed that they be sustained. To which ruling plaintiff then and there excepted, but asked and obtained leave of the court to file an amended petition.

And thereafter, on the 18th day of November, 1901, filed its first amended petition. Thereupon defendant asked and obtained leave of the court to file exceptions thereto, and the court stated that the exceptions could be presented verbally and thereafter reduced to writing and filed herein.

And thereupon defendant excepted specially to the insufficiency of all that part of plaintiff's said amended petition filed November 18th, 1901, which seeks to recover for freight, trouble and transportation on the tank cars and all that part thereof seeking to recover rent or for the use of said tank cars, and all that part thereof, seeking to recover for loss of customers and contracts, credit and reputation, because the pleadings as to neither of said items stated facts showing any cause of action against defendant, and because as to the latter items, the pleadings did not state that any notice of such special damage was given to defendant, at or before the time of making the contract sued upon, and because such special damage cannot be had in addition to the ordinary damage already sought in the petition for the breach; which exceptions the court sustained after due argument and consideration, and defendant declined to amend. The court declaring that the measure of damage was the difference between the contract price of the oil and the value of same at the time of the alleged breach thereof, and that it would not consider any testimony not bearing upon this issue in the pleadings.

Wherefore it is ordered, adjudged and decreed that the
20 plaintiff take nothing as to said items. To which action and ruling of the court, plaintiff then and there excepted.

Thereupon, the plaintiff announced ready for trial but the defendant insisted that the court should take up its plea to the jurisdiction as contained in its said answer, filed November 12th, 1901, separately, and the court over plaintiff's objection ruled that it would take up and dispose of such plea to the jurisdiction before trying the cause before the jury. To which ruling plaintiff then and there

excepted; and thereupon demanded a jury to hear said plea and determine the issue of fact therein, but the court refused to allow the plaintiff to have a jury, stating that such issue of jurisdiction was a question for the court and refused to allow the plaintiff a jury and required plaintiff to leave the determination of such plea to the court without a jury. To which ruling of the court plaintiff then and there excepted.

Thereupon, both plaintiff and defendant announced ready for trial upon said plea to jurisdiction, and the court having heard the evidence and argument, is of opinion that said plea to the jurisdiction is well taken being of opinion that the real matter in controversy clearly does not exceed two thousand dollars ($2,000) and that more than that sum is claimed by plaintiff for the fraudulent purpose of conferring jurisdiction upon the court.

Wherefore it is ordered, adjudged and decreed that the plea to the jurisdiction be sustained and that this cause be dismissed from this court for want of jurisdiction, and that defendant have and recover of and from plaintiff all costs in this behalf incurred for which let execution issue. To which rulings and action of the court plaintiff then and there excepted.

21 *Order Granting Writ of Error to Supreme Court.*

Entered November 30, 1901.

GLOBE REFINING COMPANY
vs.
LANDA COTTON OIL COMPANY. } No. 652.

In this cause: it is ordered upon the application of the plaintiff, that the said plaintiff be and he is hereby granted a writ of error to the Supreme Court of the United States to review the final judgment entered herein on the 23rd day of November, 1901; and the court hereby certifies to the Supreme Court that the said final judgment in this cause is a judgment dismissing this cause for want of jurisdiction, on the ground that the amount of damages stated in the pleadings was colorable and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case within the jurisdiction of the court, and the court hereby certifies this cause to the Supreme Court upon the question of jurisdiction alone, and causes to be sent up the record necessary for the determination of said question.

Ordered and adjudged in open court at San Antonio, Texas, November 30, A. D. 1901.

(Signed) T. S. MAXEY, *Judge.*

Order Extending Time within which to File Bill of Exceptions.

Entered November 25th, 1901.

GLOBE REFINING COMPANY
vs.
LANDA COTTON OIL COMPANY. } No. 652.

It is ordered by the court, the counsel on both sides consenting that the plaintiff have until December 15, 1901, to prepare and present its bill of exceptions in this cause.

22 *Bill of Exceptions No. 1.*

Filed December 13, 1901.

GLOBE REFINING CO.
vs.
LANDA COTTON OIL CO.

Be it remembered that when the above-stated cause was called for trial the following proceedings were had to wit: The counsel for the defendant demanded a trial of his plea to the jurisdiction of the court to hear and determine the cause, and that this be heard separately from the main cause of action and not with it, and although plaintiff objected to this separation, the court overruled the objection and ruled that the issue of the plea to the jurisdiction he heard separately. Plaintiff then and there excepted to said ruling. Thereupon the plaintiff called for a jury to try the issues of fact raised by the plea to the jurisdiction but the court refused to submit such facts to the jury and ruled that the court should and would try the said issues without a jury and that under the laws of the United States it was within the province of the court and not of the jury. To this ruling of the court the plaintiff then and there excepted and objected and tenders this his bill of exception and asks that same be made a part of the record, which is done, and the court hereby certifies to the Supreme Court this cause upon the issue presented above.

Signed December 13th, A. D. 1901.

(Signed) T. S. MAXEY, *Judge.*

Endorsed: No. 652. Globe Refining Company *vs.* Landa Cotton Oil Company. Bill of exceptions No. 1. O K. Denman, Franklin & McGown, Filed December 13th, 1901. D. H. Hart, clerk.

23 *Bill of Exceptions Nos. 2. and 3.*

Filed December 13, 1901.

In the Circuit Court of the United States in and for the Western District of Texas, Sitting at San Antonio.

GLOBE REFINING COMPANY
vs.
LANDA COTTON OIL COMPANY. } No. 652.

Be it remembered, that on the 11th day of November, 1901, this cause coming on to be heard upon the questions of law, plaintiff's original petition filed herein March 9th, 1900, was read to the court, it being in words and figures as follows, to wit:

STATE OF TEXAS, }
County of Bexar. }

In the Circuit Court of the United States for the Western District of Texas, at San Antonio, 1900.

To the Hon. T. S. Maxey, judge of said court:

Your petitioner, The Globe Refining Company, a corporation under the laws of the State of Kentucky, and doing business in Kentucky, Texas and other States of the United States of America, and being a resident citizen of the State of Kentucky and not of the State of Texas, and complaining of the Landa Cotton Oil Company, a corporation under the laws of the State of Texas, and residing and doing business in the State of Texas, in the county of Comal, and within the western district of Texas, whose president and general manager is Harry Landa, who also resides in the said county of Comal.

And for the cause the plaintiff, Globe Refining Company says, that heretofore on or about the 24th day of July, 1897, the said plaintiff and defendant entered into a contract whereby the defendant agreed to sell and ship to plaintiff's order ten tanks of prime crude cotton-seed oil at an agreed price then and there, made by and between the said parties, being 15¾ cents per gallon, each gallon consisting of 7½ lbs. in plaintiff's tanks, free on board cars at
24 defendant's mills in New Braunsfels, Texas, weight and quality of the oil was guaranteed by defendant, that is to say, it was agreed and understood that the plaintiff be a resident citizen of Louisville, Kentucky, and not of the State of Texas, then or at that time and the defendant (and its mills being located in New Braunfels, Texas, and being a citizen of the western district of the State of Texas and not of the State of Kentucky, or any other State than Texas) that the said plaintiff would send its cars with tanks thereon to the mills of the defendant and that the defendant would promptly fill them with oil as aforesaid, filling all the said tanks during the

months of August and September, five of said tanks were agreed by the parties hereto to be filled by said defendant during the last half of August, 1897, and the other five tanks during the first half of the succeeding month, and the defendant was to bill same to the plaintiff's order to such a point or points as plaintiff might direct, that is, shipping directions to be furnished by plaintiffs and at the time of the shipment, the defendant should draw sight draft with bills — lading attached for payment.

Plaintiff has performed and has been ready to perform its part of the contract at all times.

That in pursuance of and in compliance with the said contract, plaintiff at great expense and trouble sent its tanks as required by the said agreement, to defendant's said mills, and to such other points as would enable the plaintiff to have the cars at the said mills of defendant for the reception of the said crude oil, during the time agreed upon as aforesaid.

That on or about August 26th, 1897, defendant filled and shipped in the manner and form aforesaid, under the terms of said contract, one tank of the said oil, said tank containing 6606¾ gallons of oil, which said oil was received and paid for by plaintiff, and that on the 30th day of August, of the same year, defendant partially filled and shipped another tank of oil, failing however and refusing to fill the same as was contemplated by the aforesaid contracts and the same was by defendant shipped out in violation of the said contract, same being 1153¾ gallons short, which shortage was unknown to plaintiff for several days thereafter, and that on the 1st day of September of the same year, the defendant shipped out in accord-
25 ance with the terms of said contract, one other tank of oil, but failed and refused to ship or send to plaintiff or to his order any more oil, declaring and so notifying plaintiff on or about the — day of —— 1897, that he refused to further comply by shipping or furnishing the remaining seven tanks of oil in accordance with its contract or otherwise, thereby again breaching the terms thereof, thus failing and refusing to comply with said contract and agreement, thereby entailing great and heavy loss and inconvenience, trouble and annoyance on plaintiff to his damage in the sum of three thousand five hundred dollars.

That at the time of the breach of the said contract by the defendant as aforesaid and for several days prior thereto and for months immediately thereafter, crude oil of the kind and quality aforesaid, and for which plaintiff had contracted with defendant was worth 18¾ cents per gallon, and same was worth 18¾ cents per gallon in the market and it would have cost it that much to replace same, had plaintiff been able to have replaced same in proper time at all, and it was reasonable worth that sum per gallon to procure same, and did cost the latter sum per gallon when plaintiff did procure same in addition to the loss of time in procuring same.

That each of said ten tanks to be shipped to defendant by plaintiff as hereinbefore stated had a capacity of holding about 6700 gallons each, and when filled as they should have been by defendants, would have required 6700 gallons each of crude oil as aforesaid, that

is to say the defendant fell short in the amount of oil that he should have shipped the plaintiff (including said 1153¾ gallons) as contracted for as hereinbefore stated, in the amount of 48053¾ gallons reasonably worth 18¾ cents per gallon, from which amount subtract the sum of 15¾ cents per gallon (the contract price) and we find that the plaintiff's loss in this regard is fourteen hundred and forty-one and $\frac{60}{100}$ dollars.

That by reason of said breach of said contract by defendant, plaintiff has lost the use of his said tanks for a period of — least thirty days, each reasonably worth $3.00 each per day, whereby plaintiff is damaged in the further sum of $700.00. Plaintiff further says that *the* time was of the essence of the aforesaid contract in this, that the defendant by the terms of his contract was to fill at
26 least five of the tanks with oil by the first day of August, 1897, when in truth and fact it only filled three of them, although, plaintiff had the empty tanks for the reception of the said oil on hand and ready to be filled and in every way complied with the terms of its said agreement; and it expected and had arranged and had also contracted with the defendant to that effect, and had arranged with its own customers to furnish the seven tanks of oil within a certain period of time, which contemplated the sharp compliance by defendant with said contract, all of which was well known to the defendant, and it had contracted to that end with plaintiff, and if defendant had so complied with the terms of its agreement, plaintiff would have been able to have furnished its said customers with the oil aforesaid, but plaintiff failed to meet its obligations to its customers by reason of said failure on the part of defendant to deliver on time said tanks, and it was too late to fill plaintiff's orders and contracts after notice of defendant's failure and refusal to deliver said oil, whereby it was subjected to heavy damages and losses, thereby losing said customers and said contracts and suffering the loss of its credit, and reputation, to its damage in the further sum of one thousand dollars.

Plaintiff further alleged that in asking for the said shipment of the said oil, plaintiff was under the necessity of arranging to send and sending at great expense its tanks from distant points to the defendant's said mills to receive said oil, all of which was well known to defendant, and in contemplation of the aforesaid contract, and was well understood by both plaintiff and defendants that at the time of making and entering into said contract the plaintiff was required to pay additional freight in order to rearrange the destination of its various tanks and other points that the additional rate of freight, that plaintiff was under the necessity of paying and which it had to pay by reason of the breach of the aforesaid contract upon the part of the plaintiff and which was the necessary and approximate loss and expense incurred thereby, was the sum of three hundred and fifty dollars; that said expense was brought about by the unwarranted failure upon the part of the defendant to carry out its said contract, that the said planning and expense and expense incurred in the moving of said cars holding said tanks to meet the emergencies and to reach other points to be filled more

unavoidably incurred, and for all of which the defendant became liable and bound to pay.

27 Plaintiff further says that it sent its cars with said tanks to the mills of defendant, and paid for such oil as was furnished it, giving at all times such instructions as *was* necessary and required for shipping said oil, and in every way complied with its contract and held itself ready to comply with any and all provisions thereof, all of which was well known to defendant, but it without legal cause refused compliance as aforesaid.

That by reason of the making of said contract the defendant became bound to a strict performance of same. It became bound to fill the tanks of plaintiff as agreed upon, and by so doing it was the intention of the said parties to fill five of them during the month of August, 1897, and five during the month of September, 1897, and for defendant's said failure it became liable for the injury and damage that accrued to plaintiff as hereinbefore set out by reason of its failure to comply with said contract.

Wherefore, premises considered plaintiff prays for process against defendant and that it be cited to answer this petition and for judgment for said damages and costs of suit and for general relief.

(Signed) J. D. GUINN,
Attorney for Plaintiff.

Endorsed: No. 652. The Globe Refining Company *vs.* Landa Cotton Oil Company. Plaintiff's original petition. Filed this 9th day of March, 1900. D. H. Hart, clerk, by A. Grosenbacher, deputy. J. D. Guinn for plaintiff.

And thereupon were read and presented to the court defendant's special exceptions thereto contained in its answer filed November 12th, 1901, which were in words and figures as follows, to wit:

"And if further required to answer defendant excepts to said petition, because it shows upon its face that this court has no jurisdiction as the amount involved is less than $2,000.00.

2. It excepts to the sufficiency of the petition as to all the items of damage, except the $1441.60 item, because the petition shows that all the said items of damage are included in said $1441.60. Because they are for the same damages in other forms and in other words.

3. Defendant excepts to the sufficiency of the petition as to all items of damage, except said $1441.60 item, because the same are insufficient in law and because the allegation- of the petition show that they are not proper grounds for damage, and are not proper measures of damage.

4. Defendant excepts to the sufficiency of the petition as to all of the items of damage because they are vague and indefinite."

28 And the same having been duly considered by the court the court sustained said exceptions, to which plaintiff excepted.

The court in rendering its judgment stated in effect that the only cause of action shown was upon the item for one thousand four hundred and forty-one and $\frac{60}{100}$ dollars ($1441.60) and that that was

below the jurisdiction of the court, and that after sustaining the said exceptions to the other items the cause could be dismissed for want of jurisdiction:

And thereupon plaintiff asked leave to amend its pleadings; and thereafter on the 18th day of November, 1901, it filed its first amended petition herein; and thereupon as stated in the final judgment herein, defendant specially excepted to the sufficiency of all that part of plaintiff's said amended petition which seeks to recover for freight trouble and transportation on the tank cars and all that part thereof seeking to recover rent or for the use of said tank cars, and all that part thereof, seeking to recover for loss of customers and contracts, credit and reputation, because the pleadings as to neither of said items stated facts showing any cause of action against defendant, and because as to the latter items the pleadings did not state that any notice of such special damage was given to defendant at or before the time of making the contract sued upon and because such special damage cannot be had in addition to the ordinary damage already sought in the petition for the breach, which exceptions the court sustained after due argument and consideration and defendant declined to amend.

And thereupon the court decreed that plaintiff take nothing as to said items.

And thereupon plaintiff announced ready for trial upon the merits but defendant insisted that the court should first take up its plea to the jurisdiction as contained in its said answer filed November 12th, 1901, and the court over plaintiff's objection ruled that it would take up and dispose of said plea to the jurisdiction before trying said case before the jury as set out in plaintiff's bill of exceptions number one herein.

And thereupon both parties announced ready for trial upon said plea to the jurisdiction; and thereupon defendant on said issue before the court introduced in evidence the following:

First. Plaintiff's said original petition filed herein March
29 9th 1900 in words and figures as above copied.

Second. The special exceptions thereto which were presented and sustained by the court and the action of the court thereon had on the said 11th day of November, as above set out.

Third. The allegations of the plaintiff's said first amended petition filed November 18th, 1901.

Fourth. A letter from Thomas and Green, brokers, through whom the sale of the oil from defendant to plaintiff was made, which letter was admitted by both parties to be a correct statement of the contract, a copy of it having been sent by said brokers to each of the parties to this suit, said letter being in words and figures as follows:

Confirmation of Sale.

DALLAS, TEXAS, 7/30/97.

Landa Oil Company, New Braunfels, Texas.

GENTLEMEN: Referring to the exchange of our telegrams today, we have sold for your account to the Globe Refining Company, Louisville, Kentucky, ten (10) tanks prime crude C/S oil at the price of 15¾ cents per gallon of 7½ pounds f. o. b. buyers' tank your mill. Weights and quality guaranteed.

Terms: Sight draft without exchange b/ldg. attached. Sellers paying commission.

Shipment: Part last half August and balance first half September. Shipping instructions to be furnished by the Globe Refining Company.

Yours truly,
(Signed) THOMAS & GREEN, *as Brokers.*

Fifth. Telegram sent by plaintiff to defendant September 21st, 1897 in the following words:

"LOUISVILLE, KENTUCKY, 9/21, 1897.

Landa Cotton Oil Company:

No reply we have bought oil your account and hold you for difference.

GLOBE REFINING COMPANY."

Sixth. The following letter written by plaintiff to defendant:

"LOUISVILLE, *November 18th*, 1897.

30 Landa Cotton Oil Company, New Braunfels, Texas.

GENTLEMEN: We enclose you herewith bill for difference in price on oil bought to fill the undelivered portion of your contract for 10 tank cars of prime new crude and the mileage we paid to the various lines to get cars back into our service. We would thank you to send us New York exchange to cover. All of these tanks have not been returned and we shall expect you to reimburse us for any additional mileage we may have to pay.

Yours truly,
(Signed) GLOBE REFINING COMPANY,
By C. G. HEWITT, *Sec'y and Treas.*"

And the bill enclosed in said letter in the following words:

Globe Refining Company, refiners of cotton oil.

LOUISVILLE, KY., *Nov.* 6, 1897.

Sold to Landa Cotton Oil Company, New Braunfels, Texas.

Terms: ——

To 7 tanks prime crude bought to fill undelivered portion your contract 46,200 gals. 17¼.....	$7969.50	
Less contract 46,200 gals. 15¾.....	7276.50	
		693.00
To oil bought to complete loading G. R. C. # 14 1153⅛ gals., 1½.....		17.30
Shortage as per statement.....		18.90
Mileage paid as per freight bills:		
G. R. Co. No. 58 & 50.....		127.14
" " " 11 & 18.....		125.14
" " " 10.....		7.80
Charges on bill of lading G. R. Co. 14.....		32.00
		$1021.28

To the introduction of this statement and letter plaintiff objected on the ground:

1st. That same was in the nature of a compromise and that this was shown by the deposition of witness thereon filed herein and set out hereafter in this bill of exception and was not intended and did not operate as conclusive of the amount of damage to which plaintiff was entitled.

2nd. Because same did not conclude the plaintiff from claiming other and further damage in case same was not excepted.

31 3rd. Because the same did not comprehend the true basis or measure of damage.

But the court overruled said objections and admitted and considered said testimony.

To this ruling plaintiff then and there excepted and tenders this its bill of exceptions and asks that same be made a part of the record and its second bill of exceptions; which is done.

Seventh. And the following letter written by plaintiff to defendant:

"LOUISVILLE, *Aug.* 28*th*, 1897.

Landa Cotton Oil Company, New Braunfels, Tex.

DEAR SIRS: We wired you this morning and now confirm as follows: 'Ship all tanks New York instead of Louisville, route as named our advices.'

You will understand this to be your authority to ship all the tanks to New York instead of Louisville, routing them via the lines named in our communications, c/o L. & N. at Memphis. As these

cars all have a capacity of 49,500 lbs. and there is a difference of 2 cents in the rate to New York in favor of the 50,000-pound load, you will therefore, in making out your bill of lading, bill the cars at 50,000 pounds and insert in the bill of lading the rate of 63 cents per 100 pounds.

Please acknowledge receipt.

In our letter of the 25th we advised you that G. R. Co. No. 18 was forwarded via L. & N. and the Cotton Belt. We afterwards changed this and made the routing L. & N. L. R. & M., Cotton Belt and I. & G. N. You will therefore please bill this car to New York and route via I. & G. N., Cotton Belt, L. R. & M., c/o *of* the L. & N. at Memphis. We will forward you today G. R. Co. No. 33 via the L. & N., L. R. & M., Cotton Belt and I. & G. N.

You will please ship this to New York observing the routing named above.

Yours truly,

(Signed) GLOBE REFINING COMPANY,
By C. G. HEWITT, *Sec'y and Treas.*"

It being understood that the court would not hear and con-
32 sider testimony upon any of those matters or issues set out in plaintiff's said amended petition as to which it had sustained defendant's exceptions as aforesaid; thereupon the plaintiff read in evidence the testimony of Louis K. Ferguson, who testified by deposition taken herein May 8th, 1900 to the following: That he was president of the company, who is plaintiff, The Globe Refining Company, and that he resides in Louisville, Kentucky, at which place the business of the Globe Refining Company is located. That he knew all the facts and circumstances pertaining to the contract between plaintiff and defendant for the shipment of the ten tanks of oil in August and September, as well as what was done in regard thereto. We made contracts with the defendant as set out in said letter from Thomas & Green. This contract would mean that the plaintiff was to furnish the tank cars for the moving of the oil at Landa's mill and give the shipping directions, and the defendant was to draw on us at sight with the bill of lading attached as the tank cars were loaded. We consummated the contract through the defendant's agent, Thomas, at Dallas, Texas. Plaintiff complied with that part of its contract by sending the tank cars to New Braunfels, to be loaded, and we offered to carry out our contract in every particular. Landa Cotton Oil Co. loaded one tank in August 26th containing 49550 pounds. In September 1st it loaded tank car No. 59 containing 49500 pounds, and on August 30th was loaded tank No. 14 containing 40850, all of these tanks were of the same capacity. After that the defendant refused to ship any more oil, having loaded only three of the tank cars of the ten tanks stipulated for in the contract, one of these cars not being fully loaded, being 1153 gallons short, and refused to load any more tanks, claiming that we had violated the contract twice. First, because we wrote that he should pay the extra freight that was charged on tank 14 which was not loaded to capacity, the capacity of this tank being 49500 to 50,000

pounds, and the railroad charged the freight on the full capacity of the tank whether so loaded or not, and it was defendant's fault that it was not loaded fully. I might here explain that the railroads hauled the empty tanks southward free of charge provided the tanks when loaded were returned over their road, and to make certain that they get the return load, they make a charge against the empty tanks which is cancelled when the bill of lading is taken out for the loaded tanks over their line. This the Landa Cotton Oil
33 Company well knew. As there was no charge on the bill of lading for the other tanks that they shipped, and if the railroad insisted on the $32 charge defendant should have telegraphed or loaded some of the other tanks that they had at the mill. The railroad was not entitled to this charge, and as the mill had made the mistake in loading only 40850 in this tank we had to pay freight on 50000 for, we thought it was another error about the $32. They could have billed any amount of charges which we would have had to pay and the railroad company would have paid them.

When the plaintiff made the purchase from the defendant the oil was worth in the market 15¾ cents f. o. b. cars at the mills in Texas. Shortly after the deal was made with the defendant oil began to advance until in the last part of August it reached as high as 18 cents, we having bought from the oil mills in Texas at that price. During the first part of September of the said year the price of oil had still further advanced and we could not get any oil in Texas at what we thought was a reasonable price, the mills preferring to hold their oil. And we would have been compelled to pay 19 and 19½c. for the oil. On September 8th we bought from Selma, Alabama ten tanks, the next day ten other tanks paying 19½ loose f. o. b. and on the 13th of September we paid 20c. for a lot of oil at Memphis, the rate of freight from Selma and Memphis rules about one cent per gallon less than the freight from Texas, which would make this oil equal to 18½ or 19c. in Texas, although as we stated we could not get the oil in Texas at that price. After the middle of September oil from similar points in Texas began to decline steadily and we made purchases at lower figures, it having gone down to 13½ cents by the first of November. We tried to buy additional oil from the defendant but they declined to sell on account of the unsettled state of the market. About the latter part of August we were offered from John Hamilton, a broker in Dallas, five tanks of Landa oil at 18½ cents. We called Landa's attention to this letter and he stated in a letter that he did not authorize Hamilton to sell at 18½c. but they would probably sell five tanks the next week at 18½c. provided there had been no change in the price. We thought that 18½ too high and were only paying 18c. at that time. We have a letter in reply to that which reads as follows:

"NEW BRAUNFELS, TEXAS, *September* 2, 1897.

34 Globe Refining Company, Louisville, Kentucky.

GENTLEMEN: Referring to your- of the 30th of August, we did not offer Hamilton & Co. any oil at 18½c. They wanted us to

sell them five tanks, and I stated to them that we had none to offer but would probably sell them five tanks in a week at 18½ cents provided the seed receipts justified, and there was no change in the market.

HARRY LANDA,
V. P., Gen. Manager of Landa C. O. Co."

It is the universal custom for cotton-seed oil to be sold on specifi*f* delivery. The price for different deliveries varying according to the supply and demand for the particular delivery. We made the contract with Landa for five tanks in August and five tanks in first half of September so we could make contract for refined oil based on this delivery of crude oil allowing what time was needed to get the oil from New Braunfels to Louisville, Kentucky. At the time that the defendant refused to deliver us the oil as stated there was very little oil offering for the reason that the mills were advancing the price of seed on each other, and we could not get anything like the amount of crude oil for shipment that we could dispose of as refined oil, the oil for prompt shipment was very scarce, and the mills were inclined to sell for future delivery. The market continued to decline and was lower in November than it was when we made the contract with the defendant. Plaintiff was therefore damaged and lost $297.00 for defendant's failure to ship the two tanks in August, 1897. And plaintiff was also damaged and lost $990 on account of the failure of the defendant to ship the five tanks which it agreed to ship the first half of September, 1897. The market in Texas was at least 18¾ and it would have been hard to have gotten the oil at this. Plaintiff was damaged and lost on account of defendant not filling our tank # 14 full $26.94, being the difference between the purchase price of 15¾ and 18c. per gallon, or 1153 gallons. Plaintiff was also damaged and lost on account of this breach of the contract of defendant $260.00, being mileage paid on empty tanks, as shown in answer to question No. 8. Plaintiff lost the use of seven tank cars for 242 days on account of the refusal of defendant
35 to fill them with oil and to ship them to plaintiff as per contract. At that season of the year $3 per day per car was very low rental or compensation. This loss amounted —over $726.00. An itemized account of the delay is given in answer to question No. 8. Plaintiff had to pay and did pay various customers in Triste, Australia, two shillings per 100 kilos, amounting to $1\frac{6}{10}$c per gallon, or $729.20 damage for failure to ship oil which plaintiff had sold them. Had defendant sent the oil to plaintiff it would have been refined and shipped to Triste and this loss saved the plaintiff.

We knew that the defendant refused to fill the tank cars because he wrote us that he would do so, and for the fact that the empty tanks were at the mill for loading and he loaded only three of the tank cars. The correspondence relating to the loading and the shipment of the tank cars was sent to our attorney in San Antonio. The letter that we received notifying us of defendant's refusal to further comply with the contract is of date September 11, 1897, and was received by us on the 14th of September, 1897.

We did write to Landa some time about the 18th of November, 1897, an itemized account of our various charges for their failure to fill the contract. We based this on the basis of 17¼ cents crude oil which was by way of compromise as the market had declined at time of making this offer and we thought that if they would pay us this difference we would rather settle than have a lawsuit over the matter, and it in no way represented the full amount of our loss by their failure to comply with the contract, and it had no reference to the price of oil at that time that they should have shipped it, or to many items of damages that we sustained. The figures in the statement were correct on the basis of 17¼ of crude oil for which we would have had to pay 19c. if no more, and if we could have gotten any oil in time to have completed their contract. At the time of making this statement we had not received from the railroad all of the charges for hauling empty tanks, but as stated we were willing to have them pay us this amount to have s-ttled the matter without further trouble or a lawsuit.

At the time of sending in this bill to defendant we had not bought oil to complete the contract in Triste, and even if we had been able to buy oil we could not have moved the tanks to another mill so as to have made the shipment in time.

Plaintiff was unable to buy oil in time to complete the contract with others, it had arranged to sell to in Triste, Australia.

36 Answering 57th cross-interrogatory witness said "Yes, we wrote our attorney J. D. Guinn at San Antonio, Texas that we could not have replaced this oil (meaning that which we were to receive from defendant by virtue of the contract between plaintiff and defendant) under 18¾c., or probably 19 or 19½c. per gallon. That is, in the first part of September. The bill that we sent to the defendant on November 6th (being bill in evidence) was based on 17¼c. and as we have stated the market was lower and declining at this date, and was made in the nature of a compromise, hoping to get some compromise."

And the above and foregoing was all the testimony in the case.

And after argument of counsel and upon consideration of the court, the court held that the proof showed that the allegations in plaintiff's petition were improperly made for the purpose of giving jurisdiction to the court of this cause, and held that the court did not have jurisdiction and entered judgment accordingly, to which action, ruling, and judgment of the court the plaintiff then and there excepted, and tenders this *his* bill of exceptions, and prays that same be allowed, signed and made a part of the record, which is done. And the court hereby certifies to the Supreme Court this cause upon the issue of jurisdiction alone.

Signed December 13th, A. D. 1901.

(Signed) T. S. MAXEY, *Judge.*

Endorsed: No. 652. Globe Refining Company *vs.* Landa Cotton Oil Company. Bill of exceptions Nos. 2 and 3. O K. Denman, Franklin & McGown. Filed December 13th, 1901. D. H. Hart, clerk.

37 *Petition for Writ of Error.*

Filed November 29th, 1901.

In the United States Circuit Court in and for the Western District of Texas, at San Antonio, Texas.

GLOBE REFINING COMPANY
vs.
LANDA COTTON OIL COMPANY. } No. 652.

To the honorable judge of said court:

The above-named plaintiff feeling himself aggrieved by the judgment rendered in the above-entitled cause on the — day of November, 1901, desired to have the same reviewed by the Supreme Court of the United States on writ of error upon the issue of jurisdiction alone, and it prays the court to grant it a writ of error to the Supreme Court of the United States from this court for the purpose of reviewing said judgment, and it prays the court to certify to the Supreme Court of the United States this cause upon the question of jurisdiction alone, and it herewith presents its assignments of error and appeal bond, and prays that same be approved and allowed.

(Signed) J. D. GUINN,
Attorney for Appellant.

Granted November 30, 1901.
(Signed) T. S. MAXEY, *Judge.*

Endorsed: No. 652. In the circuit court of the United States in and for the western district of Texas, at San Antonio. Globe Refining Company *vs.* Landa Cotton Oil Co. Petition for writ of error. Filed November 29th, 1901. D. H. Hart, clerk, by A. Grosenbacher, deputy.

38 *Assignments of Error.*

Filed November 30, 1901.

In the United States Circuit Court for Western District of Texas, at San Antonio.

GLOBE REFINING COMPANY
vs.
LANDA COTTON OIL COMPANY.

To the hon. Supreme Court of United States of America:

Now comes the plaintiff, The Globe Refining Company in the above-entitled cause, by its attorneys of record, and presents the following assignement of errors committed by the trial court, and by reason of which errors asks the judgment of dismissal be set aside, and that the circuit court in and for the western district of Texas be directed to hear said cause.

1st assignment of error. The court erred in sustaining the defendant's exceptions to plaintiff's 1st amended original petition, which same holds in effect that plaintiff is not entitled to recover for freight trouble and transportation of the tank cars, as well as all that part thereof that seeks to recover rent for the use of said tank cars; also that seeking to recover for loss of customers, contracts, credits, and reputation, the court in effect holding that the same were insufficient upon which to base a claim for damages, stating in said decree that the pleadings showed no facts constituting a cause of action outside of what it termed the ordinary damage, which it held to be the difference between the contract price of the oil and the value of the same at the time of the alleged breach thereof, and the court refused to consider testimony upon any other issue.

2nd assignment of error. The court erred in its ruling as shown in bill of exception No. 1, wherein it over plaintiff's objection took up and disposed of the plea to the jurisdiction before trying the cause on its merits by the jury refusing to hear same with the merits or to consider any testimony except as to the amount of the difference between the contract price of the oil and the value of same at the time of the alleged breach thereof, eradicating all other issues.

Third assignment of error. The court further erred in its ruling upon bill of exception No. 1 wherein the court refused to allow the plaintiff to have a jury to pass on the facts in issue on plea to jurisdiction, holding that the issues of fact, as well as of law *was* in its province and not that of the jury, and required the plaintiff
39 to leave the determination of such plea of fact as well as of law to the court upon the one issue set out in the second assignment herein.

4th assignment of error. The court erred in its ruling as set forth in bill of exception No. 2 wherein it admitted in evidence the letter and statement set out in said bill, and considered same as conclusive of the amount of damage, or amount of loss to which plaintiff would be entitled to recover.

5th assignment of error. The court erred in its finding and ruling as shown in bill of exception Nos. 2 and 3 wherein it held that the evidence showed conclusively that the court had not the jurisdiction of this suit and that the matter in controversy did not exceed $2,000 in considering the matters set out in letter of Sept. 11, 1897, and that the allegations for more than that sum were fraudulently made to confer jurisdiction.

6th assignment of error. The court erred in rendering judgment and dismissing the cause for want of jurisdiction and for costs of court, when it should have submitted the whole matter to a jury upon its merits.

Wherefore the said Globe Refining Company, plaintiff in error, prays that the judgment of the circuit court of the United States for the western district of Texas be reversed, and that the said circuit court be directed to grant a trial in said cause.

(Signed) J. D. GUINN,
Attorney for Plaintiff in Error and Plaintiff in the Lower Court.

Endorsed: No. 652. Globe Refining Company *vs.* Landa Cotton Oil Co. Assignment of errors. Filed this 30th day of November, 1901. D. H. Hart, clerk, by A. Grosenbacher, deputy.

40 *Writ of Error Bond.*

Filed November 30, 1901.

In the Circuit Court of the United States in and for the Western District of Texas, at San Antonio, Texas.

GLOBE REFINING COMPANY
vs.
LANDA COTTON OIL COMPANY.

Know all men by these presents: that we, The Globe Refining Company, as principal and The American Bonding & Trust Company of Baltimore City as sureties are held — firmly bound unto The Landa Cotton Oil Company in the full and just sum of five hundred dollars to be paid to the said Landa Cotton Oil Company, *his* certain attorneys executors, administrators, or assigns to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of November, 1901.

Whereas, lately at the session of the circuit court of the United States for the western district of Texas, in a suit pending in said court between Globe Refining Company as plaintiff and Landa Cotton Oil Company as defendant, a final judgment was rendered against said plaintiff, and the said plaintiff, Globe Refining Company having obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and citation directed to Landa Cotton Oil Company is about to be issued directing, citing and admonishing it to be and appear at the Supreme Court of the United States to be holden at ——.

Now the condition of the above obligation is such that if the said Globe Refining Company shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it, if *he* fail to make its plea good, then the said obligation is to be void, otherwise to remain in full force and virtue.

(Signed) GLOBE REFINING CO.,
By its attorney of record, J. D. GUINN. [SEAL.]
THE AMERICAN BONDING & TRUST COMPANY OF BALTIMORE CITY,
By JOHN WOODS, *Vice-President.*

Attest:
(Signed) T. W. CAMPBELL,
Ass't Sec'y.

Approved November 30th, 1901.
(Signed) T. S. MAXEY, *Judge.*

41 Endorsed: No. 652. In the circuit court of the United States in and for the western district of Texas at San Antonio. Globe Refining Co. *vs.* Landa Cotton Oil Co. Writ of error bond. Filed this 30th day of November, 1901. D. H. Hart, clerk, by A. Grosenbacher, deputy.

42 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The Globe Refining Company, plaintiff and The Landa Cotton Oil Company, defendant a manifest error hath happened, to the great damage of the said Globe Refining Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States at Washington, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court of the United States to be then and there held, and the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of November, in the year of our Lord one thousand nine hundred and one.

{The Seal of the U. S. Circuit Court, Western Dist. Texas, San Antonio.}

D. H. HART,
Clerk of the Circuit Court of the United States for the Western District of Texas,
By A. GROSENBACHER, *Deputy.*

Allowed this the 30th day of November 1901.
T. S. MAXEY,
United States Judge.

[Endorsed:] No. 652. In the circuit court of the United States, in and for the western district of Texas, at San Antonio. The Globe Refining Company *vs.* Landa Cotton Oil Company. Writ of error. Filed this 3" day of November 1901. D. H. Hart, clerk, by A. Grosenbacher, deputy. (21.)

43 THE UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

The President of the United States to the Landa Cotton Oil Company, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to writ of error sued out and filed in the clerk's office of the circuit court of the United States for the western district of Texas, in the cause wherein The Globe Refining Company is plaintiff in error and The Landa Cotton Oil Company is defendant in error, to show cause, if any there be, why the judgment rendered against the said Globe Refining Company as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of the said circuit court, at San Antonio, this 30th day of November, in the year of our Lord one thousand nine hundred and one.

Signed this, the 30th day of November, 1901.

{ The Seal of the U. S. Circuit Court, Western Dist. Texas, San Antonio. }

T. S. MAXEY,
United States Judge.

Attest:
D. H. HART, *Clerk*,
By A. GROSENBACHER, *Deputy*.

44 [Endorsed:] No. 652. Globe Refining Company *vs.* Landa Cotton Oil Company. Citation. Marshal's return. We hereby accept service of the within citation this the 26th day of December, 1901. F. J. Maier, Denman, Franklin & McGown, attorneys for defendant, Landa Cotton Oil Company. Filed this 26 day of December, 1901. D. H. Hart, clerk, by A. Grosenbacher, deputy. (23.)

45 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
Western District of Texas. }

I, D. H. Hart, clerk of the circuit court of the United States in and for the western district of Texas, hereby certify that the foregoing on 43 pages contains a true and correct copy of the proceedings had (as therein stated) in cause No. 652, Globe Refining Company *vs.* Landa Cotton Oil Company, except that the original citation and writ of error are included therein instead of copies thereof, as fully as the same remains on file and of record in my office at San Antonio, Texas.

Witness my hand and the seal of the said circuit court, at office in the city of San Antonio, Texas, this the 26th day of December, A. D. 1901.

{ The Seal of the U. S. Circuit Court, Western Dist. Texas, San Antonio. }

D. H. HART,
Clerk U. S. Circuit Court, W. D. T.,
By A. GROSENBACHER, *Deputy.*

Endorsed on cover: File No. 18,403. W. Texas C. C. U. S. Term No. 241. Globe Refining Company, plaintiff in error, *vs.* The Landa Cotton Oil Company. Filed February 15th, 1902.

FILE COPY.

No. 241.

United States Supreme Court

FILED
FEB 26 1903
JAMES H. McKENNEY,
Clerk.

GLOBE REFINING COMPANY,
PLAINTIFF IN ERROR,

vs.

LANDA COTTON OIL COMPANY,
DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States, for the Western District of Texas.

Brief for Plaintiff in Error,

BY

C. W. OGDEN,
J. D. GUINN,
Attorneys for Plaintiff in Error.

Lodovic-Wood Printing Co. 222 N. Presa Street, San Antonio, Tex.

No. 241.

United States Supreme Court.

GLOBE REFINING COMPANY,
PLAINTIFF IN ERROR,

vs.

LANDA COTTON OIL COMPANY,
DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States, for the Western District of Texas.

Brief for Plaintiff in Error.

STATEMENT OF THE PLEADINGS AND ACTION OF THE COURT.

This was suit by plaintiff in error for damages by reason of a breach of contract on the part of the defendant; in this, that on the 24th day of July 1897 defendant entered into a written contract with the plaintiff to sell and ship to it ten tanks of prime, crude cotton seed oil @ 15¾c. per gallon of 7½ lbs. f. o. b. buyers tanks, at New Braunfels, Texas, to be billed to plaintiff to such points as defendant directed and the defendant to draw a sight draft, without exchange, with bill of lading attached for payment. It being stipulated that the

delivery was to be on specific dates; viz: 5 tanks last half of August and 5 tanks first half of September of same year. Whereby it was contemplated and understood at this time that the plaintiff was to send its tank cars from Louisville, Ky. to New Braunfels, Texas, a distance of about one thousand miles, ready to receive the oil during said times, to be loaded along as demanded by plaintiff, within aforesaid dates, time being of the essence of the contract.

Plaintiff claimed, that in compliance with the contract, plaintiff, with full knowledge of the defendant, from time to time during the whole of the dates for the shipment of the said oil at great expense and trouble, sent its tanks as aforesaid the long distance as aforesaid, to the defendant's mills for the reception of the said oil. That this was at an expense of about $900.00, which it was compelled to pay to the railroad companies for transporting said tank cars to New Braunfels, and was a clear loss unless defendant filled them, (*same being an advance on the contract.*) That two tanks and one partly filled by defendant was, during the latter part of August shipped out and paid for under the contract, but the defendant refused to fill the remaining seven tanks, and failed and refused to notify plaintiff that he would not do so until about the end of the time plaintiff was to receive the last cars, when plaintiff, under the directions of the defendant, had incurred the expenses of sending all of the tank cars to the defendant's mills as agreed on, although it was alleged that the defendant had made up his mind on the 2nd of September and did on that date refuse compliance with the contract which was in full time to prevent the heavy and unnecessary expense of plaintiff sending said cars from Louisville, thus wilfully and intentionally causing the plaintiff the unnecessary expense of advancing for freight, and loss of same, and use of its cars and other losses complained of, itemized at $1,000.00, $700.00, $340.00 and $740.00 respectively set out in

the petition in addition to the loss it had on the difference arising from the price plaintiff was to pay for the oil, and what he would have had to pay to get other oil, had it been able to get same at all (which was alleged it could not) from other sources.

Plaintiff also alleged that by reason of defendant's failure to inform it of his intention to refuse compliance with the contract, when he intended and did do so, it was thereby unable to otherwise provide or save itself from loss, of which the defendant had notice. That is, it lost money by reason of it not being able to comply with its own contracts by reason of its dependence on defendant to comply with its specific arrangements to deliver as specified in the contract, which the defendant knew was relied on by plaintiff for specific delivery, plaintiff not being informed of the breach until twelve days after same was breached and this through the wilful design and intention of the defendant, and at a time when oil could not be procured at all.

Defendant interposed special exceptions to each and all of the items of damages claimed by plaintiff, and the court sustained all of them, except the items as to the difference between the contract price of the oil and *the value of the same at the time of the breach of the contract.*

Notwithstanding plaintiff did not know of the breach at the time made, and in the face too of the fact that the price then, when he was so informed, which was twelve days later, had risen 1¼ cents in said twelve days, and in the face of the further fact that by reason of the plaintiff not being able to ship its tank cars back over the same line had to lose the freight and cost of sending them from Louisville to New Braunfels, this being well understood and in contemplation of the parties when the contract was made, and refusing also to consider testimony on any other issue, and in passing upon this last issue the court, over plaintiff's objec-

tions and exceptions, heard the plea to the jurisdiction alone and not in connection with the main cause of action, and this too without a jury, notwithstanding plaintiff demanded one.

Thus, after excluding all other issues, the court refused to allow plaintiff a jury to pass on the question of whether the facts showed the difference between the contract price of the said oil, and the value of the same at the time of the breach thereof, also as to whether it meant when the plaintiff was informed or whether the oil could be procured at all, holding that these issues of fact as well as of law were in its province and not that of the jury, requiring plaintiff to leave the determination of such pleas of fact, as well as of law to the court, and upon this only issue. In arriving at this determination the court admitted and considered, and based its judgment upon a letter written in the spirit of compromise (see bill of exception No. 2) when same did not comprehend the true measure and basis of damages nor conclude plaintiff from claiming other and further damages, and that the value of the damage under consideration was less than two thousand dollars, and further in the face of positive proof to the contrary, showed that the value of the oil, when plaintiff was informed of the breach, the oil even under only one item of damage under consideration was alleged, and we think proven to be over $2,000.00.

With general statement of the case, we present the following assignments of error:

FIRST ASSIGNMENT OF ERROR.

The court erred in sustaining the defendant's exceptions to plaintiff's first amended original petition which same holds in effect that plaintiff is not entitled to recover for freight, trouble and transportation of the tank cars as well as of all that part thereof which seeks to recover rent for the use of said tank cars; also that seeking to recover for loss of customers,

contracts, credits and reputation, the court in effect holding that the same were insufficient upon which to base a claim for damages, stating in said decree that the pleadings showed no facts constituting a cause of action outside of what it termed the ordinary damage, which it held to be the difference between the contract price of the oil and the value of the sale at the time of the alleged breach thereof, and the court refused to consider testimony upon any other issue.

We desire to present under this assignment two propositions and questions thereunder.

First Proposition.

Under the allegations of plaintiff's first amended petition, (and also under original petition) plaintiff claimed, under the special understanding, conditions and circumstances arising in this case that it was entitled to receive for certain freight charges advanced, trouble and loss for the use of its cars, by reason of the manner of the defendant's breach of the contract, in this, and other losses mentioned in the assignment that the freight complained of as being lost would not have been advanced, and having been advanced would have been refunded to him had the shipment been made, and the overtime loss of the use of the cars would not have happened, and if plaintiff's petition set up a valid claim in this regard the court had jurisdiction of the case and should have heard the evidence thereon.

Remarks.

The first question to be presented to the court is, as to whether or not there is any cause of action stated, outside of the difference in the contract price of the oil and what it was when the breach was made, not when it became known to plaintiff, the court holding that there was not, and we holding the affirmative.

Second Proposition.

The second is, as to whether the fact that plaintiff could not procure the oil from other sources, at the time of the breach or when it was informed of same, in time to supply itself and save the advances would cut any figure, i. e. made any difference in the rule for damages as announced by the trial court, by which is meant the difference between the purchase price and the price at time of breach, or at any time when breach was made known to plaintiff. We take it that it does make a difference and would change the rule, for if plaintiff could go into the market and supply himself he would not suffer the same loss as when he could not, and if he could have done so when the breach was first made and could not when it was first made known to him there should be a change in the rule especially when plaintiff had advanced its money on the contract by paying $900.00 freight, sent away from home its cars, the use of which was worth $700.00, and other losses set out in petition.

Remarks.

If we have to advance money to receive the goods, i. e. go to expense to get goods, we should be entitled to at least such part of this advancement as we would have received back, had the contract been complied with, and it is certain in my judgement that if plaintiff could not procure the oil at the time of the breach, or when breach was made known to him, that this breach would do away with the rule laid down by the court. It is claimed in the pleadings that the defendant knew of the right of plaintiff for a refunding, in case the said tanks when filled were returned over certain lines. We are at a loss to see why we would not get all moneys advanced on the contract, after the defendent had determined to cancel same, i. e. twelve days pass from the time he breaches the contract before he informs us of the fact; now if by conceal-

ing this fact we continue to incur expense, a different rule steps in. For instance, suppose plaintiff had been promptly notified on Sept. 2nd, that he cancelled or repudiated the contract and it could have saved the expense of shipping the cars to Texas, and the loss of the use of the cars for one month and to have been able to procure from other sources the oil contracted from the defendant and been able to meet its engagements at Triste and elsewhere, just the same as if defendant had filled the tanks in accordance with the contract. Then the defendant would certainly have been liable under the terms of the Hadley Bexadale case for the difference between the contract price and the market value of the oil at that date, i. e. the date of the breach or when the oil should have been delivered, although plaintiff had not sent all of its cars down to Texas. The spirit of that decision reaches beyond the mere difference of price when circumstances justify. That case says that the measure of damages "would be either such as may fairly and reasonably be considered as arising naturally * * * * or such as may reasonably be supposed to have been in contemplation by both parties at the time they made the contract, as the probable result of the breach of it."

Now if the special circumstances under which the contract was actually made, were communicated by the plaintiff to the defendant, when it was made, and were thus known to both parties, the damage resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach of the contract under those special circumstances so known and communicated:

Now in this case the declaration in the petition states (and it is admitted by the drummer) that the defendant had notice of all the special matters upon which damages are specially claimed. We take the liberty to quote from the petition as follows: "That in pursuance of and in compliance with the

said contract the plaintiff at great expense and trouble sent from time to time its tanks as required by the said agreement to the defendant's said mills to have the cars at said mills for the reception of the said crude oil at the time agreed upon as aforesaid. In order to do this the plaintiff was under the necessity of obligating itself unconditionally to the railroad company (and of which the defendant had notice) to pay to it for the transportation of the said cars from said Louisville to said New Braunfels in the sum of nine hundred dollars, which amount, it obligated itself to pay, and which it was compelled to pay to said companies, before the first day of January 1898 and which amount was paid by reason of its said contract with defendant and defendant's obligation to fill said tanks with oil as aforesaid and was incurred as an advancement on said oil contract. * * * That at the time of the breach of the said contract by the defendant, as aforesaid, crude oil of the kind and quality aforesaid, and for which the plaintiff had contracted with the defendant was worth 18¾c per gallon and same was worth 18¾c on the market and it would have cost that much to have replaced same in proper time, but by reason of the disorganized condition of the market and defendant's failure to notify plaintiff of said real breach of contract at time of breach, plaintiff was wholly unable to get the oil at all and that at the time that the plaintiff was notified of the breach the oil was worth 20c per gallon, and thereafter before the bringing of this suit was worth 25c per gallon. But plaintiff was wholly unable to procure same at all at the time or place of delivery of said oil, or at any time thereafter at said place, although every effort was made to do so, it requiring the plaintiff a number of days to negotiate so as to get other oil, necessarily losing much time."

"That the defendant contemplated the breach of said contract intending so to do, wrongfully caused, directed and instructed plaintiff to send its tank cars from Louisville, Ky.

to New Braunfels, Texas, a distance of 1000 miles at an expense and loss to plaintiff of $1,000.00 knowing at said time, and during the time said cars were in transit that he would not fill said cars and that plaintiff could not get same filled at any price at said place and knowing that plaintiff would lose the use of said cars unnecessarily and would lose much valuable time in arranging to procure other oil from other sources, if at all, and knowing that he would not be able to replace the oil that the defendant procured and agreed to furnish as aforesaid, and having full notice from the plaintiff that the said oil must and should be furnished plaintiff by the 15th day of September, 1897, defendant having positively agreed to furnish said oil by said 15th day of September, 1897. That the defendant wrongfully cancelled said contract on the 2nd day of September, without giving any notice thereof to plaintiff until the 14th of September, having determined to do so before the 2nd of September, knowing in the meantime and all of the time that plaintiff was forwarding the cars to New Braunfels as aforesaid, at great expense and loss of time, and knowing that the plaintiff could and would take advantage of said two weeks time to have supplied himself from other sources, and have saved the plaintiff this loss, and notwithstanding that the plaintiff had determined not to fill plaintiff's tank cars with oil, he deliberately had plaintiff to send them on from said Louisville to New Braunfels, and at no time did he countermand said directions, but induced said plaintiff to incur said expense unnecessarily. That plaintiff did so wilfully and maliciously, causing the loss already stated, which was an unnecessary loss to plaintiff of two thousand dollars, which plaintiff could and would have saved had the defendant notified the plaintiff of its said wrongful intention to violate said contract, at or near the time it determined to do so. That the defendant had full notice that the plaintiff relied on it to furnish said oil by the 15th of September, and had full know-

ledge that the plaintiff could not procure the same from any other source, and well knew that the plaintiff would suffer the losses herein set up if it did breach said contract in the manner herein charged, wherefore the defendant became liable and bound to pay said damage herein set up.

"That by reason of said breach of contract by defendant, plaintiff has lost the use of his said tanks by reason of defendant not informing him of his intention to fill said tanks for a period of at least thirty days, each reasonably worth three dollars each per day, wherefore plaintiff is damaged in the further sum of $700.00. Plaintiff further says that time was of the essence of the contract in this, that the defendant by the terms of the contract was to fill at least five tanks with oil by the first of August, 1897, when in truth and in fact it only filled three of them, although the plaintiff had the empty tanks for the reception of said oil on hand ready to be filled and in every way complied with the terms of its said agreement; and that it had expected, and had arranged, and had contracted with the defendant to that effect, and had arranged with its own customers to furnish the said seven tanks of oil within a certain period of time which contemplated the sharp compliance by the defendant with said contract, all of which facts as above stated was well known to the defendant, and the defendant had contracted to that end with the plaintiff, and if the defendant had so complied with the terms of said agreement plaintiff would have been able to have furnished its said customers with the oil as aforesaid, but plaintiff failed to meet its obligations to its customers by said failure of defendant to deliver in said time said tanks, and it was too late to fill plaintiff's orders and contracts after defendant's notice and failure and refusal to deliver said oil, whereby it was subjected to the heavy damage and loss of $740.00, thereby losing said customers and contracts, and suffering the loss of its credit and reputation to its damage in the further sum of $1,000.00.

"Plaintiff further alleges, that in asking for the shipment of said oil, plaintiff was under the necessity of arranging to send and sending at great expense its tanks from distant points, the defendant's said mills to receive said oil, all of which was well known to the defendant's, and in contemplation of the aforesaid contract, and was well understood by both plaintiff and defendant that at the time of making and entering into said contract, that plaintiff was required to pay additional freight in order to re-arrange the destination of the various tanks to other points. That the additional rate of freight that the plaintiff was under the necessity of paying and which it had to pay by reason of the breach of the aforesaid contract upon the part of the defendant and which was the necessary and proximate loss and expense incurred thereby, was the sum of $350.00. That said expense was brought about by the unwarranted failure on the part of the defendant to carry out its said contract as hereinbefore stated, and that the said planning and expense incurred in the moving of the said cars holding said tanks to meet the emergencies and to reach other points to be filled were unavoidably incurred, and for all of which the defendant's became liable and bound to pay."

Upon exceptions by the defendant the court held "that all the part of plaintiff's petition which seeks to recover for freight, trouble and transportation on the tank cars, and all that part which seeks to recover rent or for use of tank cars, and all that part thereof, seeking to recover for loss of customers and contracts, credit and reputation, should be struck out, as stating no cause of action." The court declaring "that the measure of damages was the difference between the contract price of the oil and the value of same *at the time of the alleged breach thereof*, and that it would not consider any testimony not bearing upon this issue in the pleadings." (Rec. p. 15.)

It will here be noted that the trial court in reaching its conclusions as to the jurisdiction to hear this case, excluded from its consideration every item of contention for damages, except *the difference between the purchase price* (viz 15¾c per gallon, there being 48053⅛ gallon shortage) and *the value of same at the time of the alleged breach thereof*" which was claimed by defendant to be $1,438.00.

QUESTION.

Does the law, in cases where the price is not paid or part paid, fix the time of the breach as the time of comparison or when plaintiff actually knew of the breach, or what it would cost plaintiff to replace the article purchased?

Suppose there was none to be had at the time? Would this answer the trouble? Does not the law fix the difference between the contract price and the price at time of breach, provided the article can be had at the time of the breach, and the plaintiff is informed thereof whereby he not only has an opportunity and time to supply himself. In other words how can he be supposed to protect himself unless he knows of the breach and has the facilities or ability to do so. The language of the court quoted above from a celebrated case and adopted all over America, as shown by a host of authorities in Field on Damages Sec. 252, 253 and 254 especially under later section, under the heading of Hadley vs. Baxendale. We here present other authorities on the subject of damages that fairly and reasonably arise from breach of the contract.

Under the allegations and proof, which showed that plaintiff could not procure the shortage of oil at *any price* when first informed of the breach of the contract, the plaintiff, would have been entitled to a charge to the jury (had there been one allowed) to the effect that if this was the true measure of damage, would have been otherwise determined than on the line laid down by the court, to-wit: The difference

between the contract price and what it was at time of the breach. That is defendant has kept the fact of its breach to itself, speculating on the price of oil going down and if so he will comply with it.

AUTHORITIES.

Taylor Mfg. Co. vs. Hatcher & Co., 3 L. R., 587 from U. S. Court S. Dist. of Georgia.
Smith vs. Bolles, 132 U. S., 125.
Grand Tower Co. vs. Phillips, 23 Wall, 471.
G. C. S. F. Ry. Co. vs. Dunman, 85 Tex., 179.

PROPOSITION TWO UNDER FIRST ASSIGNMENT.

In this case as shown above, while the plaintiff had not advanced the whole price of the goods he had advanced this freight, never to get back, and advanced the use of its tank cars so as not to have them for use to send to other places. This being true we say the rule would be the same as when the price of the goods had been advanced that is the highest price up to the time of suit and such other losses as reasonably arose out of the breach.

AUTHORITIES.

Chatham vs. Jones, 69 Tex., 745.

ARGUMENT.

The doctrine as laid down in the Hadley Baxendale case and those following this line of decisions, as to the difference in the contract price and that at the time of the breach, is based upon the fact that no part of the price was paid or the purchaser has not made any advancement, Sec. 249 of Field on Damages p. 236, commenting on this case says: "The reasons for the rule, *where no portion of the price has been paid*, are, that the plaintiff in order to receive full indemnity

should receive only such a sum as united with the price agreed to be paid for the article purchased or contracted for would enable him to go into the market and secure the same at the time of the breach. This, it is claimed would make him whole. And the theory is that the vendee would thereby be placed in the same condition as though the vendor's agreement had been fully complied with.

"But this limited rule does not apply where the property has no general market value and is not purchased as an article of commerce for sale or where the property is purchased or to be manufactured and delivered for a *particular purpose, which purpose is known to the vendor*, and the vendee sustains a damage by the non-delivery at the time stipulated, which was natural and probable to result from the non-delivery; nor to cases where the actual loss, though remote, was contemplated or may be reasonably supposed to have been contemplated by the parties at the time of making the contract as the probable result of the breach of it in which cases the defendant is liable for such damages." Further on it is said that "the reason assigned for allowing the purchaser the benefit of an advance in the price of property when the vendor has failed to deliver according to contract, where the purchaser has paid the price are, that on the failure to deliver, the purchaser being deprived of his money, may not be able to purchase at the time. Besides the defendant would not be allowed to take advantage of his own wrong, and by refusing to deliver the property enjoy the benefit of an advance upon it; and if an advance occurs he has had, or might have had the benefit of it, and the law should presume that he had enjoyed the benefit of the best price which the property has commanded; that the plaintiff, if the defendant had observed his contract, could have enjoyed the benefit of the advance; that as against the wrong doer, it should have been presumed that he would have improved the opportunity; and

that being deprived of both the property and the price, every presumption would be made in his favor."

AUTHORITIES.

This same doctrine is upheld under the same heading by all the text writers on Damages.

See Southerland on Damages under Hadley vs. Baxendale.
169 U. S., 115-682.
Randon vs. Barton, 4 Tex., 295-6.
Cartwright vs. McCook, 33 Tex., 613.

On this subject we refer the court to a very learned opinion from 16 N. Y., p. 489 and we also quote from Field on Damages, Par. 255: "In Griffin vs. Colver, the doctrine is stated by Selden J. as follows: "The party injured is entitled to recover all of his damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, they must be such as must naturally be expected to follow its violation. And they must be certain both in their nature and in respect to the cause from which they proceed.

The foregoing statement is assumed to embrace the proposition, that under the two alternative heads, in the opinion of the English case, both those damages that arise in the natural course of things and those that have been contemplated by the parties. The doctrine is sustained and approved by many American cases cited in the annexed note.

This doctrine is further supported in decisions from nearly all of the states: Hambleton vs. McPherson, 28 N. Y., 72; 33 N. J., 513; Richardson vs. Chynowith, 26 Wis., 656, it is said in that case that; "in Wisconsin where the seller had knowledge that the goods were ordered by the purchaser for a

particular occasion, and there was a failure of the vendor to so deliver and no sufficient time remained after the breach for the purchaser to purchase the goods elsewhere to supply the demand for that occasion, the vendor was held liable for such damages directly and naturally arose from the breach, although beyond the difference between the contract and the market value."

SECOND ASSIGNMENT OF ERROR.

The court erred in its ruling as shown in bill of exception No. 1 wherein, over plaintiff's objection the court took up and disposed of the plea to the jurisdiction before trying the case on its merits by the jury, refusing to hear same with the merits or to consider any testimony except as to the amount of the differences between the contract price of the oil and the value of same at the time of the alleged breach thereof, eradicating all other issues.

First Proposition under Second Assignment.

The court having held that the pleadings state sufficient matter to state a cause of action, as shown under first assignment, and that there were facts to be determined, we claim that in order to reach the entire case, that it should hear all the facts and not merely those appertaining to the plea in abatement.

Statement.

By reference to bill of exception No. 1, p. 17 of the record, the court will see that the proposition states the ruling of the court and that we excepted to it at the time.

Authorities.

Blachley vs. Davis, 1 McLean, (U. S.,) 412.
70 Fed. Rep., 370.
56 Fed. Rep., 434.
18 Howard, (U. S.,) 76.
Wetmore vs. Rymer, 169 (U. S,,) 121.

THIRD ASSIGNMENT OF ERROR.

The court further erred in its ruling upon bill of exception No. 1, wherein the court refused to allow the plaintiff to have a jury to pass on the facts in issue on plea to jurisdiction holding that the issues of facts as well as of law was in its province and not that of the jury, and required the plaintiff to leave the determination of such a plea of fact as well as of law to the court upon one issue set out in the second assignment herein.

We submit this assignment as a proposition and refer the court to the bill of exception No. 1 in the record, page 17, to show that we asked for a jury and the same was refused. It reads as follows:

"Be it remembered that when the above stated cause was called for trial, the following proceeding were had to-wit: The councel for the defendant demanded a trial of his plea to the jurisdiction of the court to hear and determine the cause, and that this be heard separately from the main cause of action, and not with it, and although plaintiff objected to this separation, the court overruled the objection and ruled that the plea to the jurisdiction be heard separately. Plaintiff then and there excepted to said ruling. Thereupon the plaintiff called for a jury to try the issues of fact raised by the plea to the jurisdiction, but the court refused to submit such facts to the jury, and that under the the laws of the United States it was within the province of the court and not of the jury. To this ruling of the court the plaintiff then and there excepted and objected, and tenders this his bill of exception and asks that same be made a part of the record, which is done, and the Court hereby certifies to the Supreme Court this cause upon the issue presented aboved."

Signed, Dec. 13, A. D. 1901.

T. S. MAXEY, Judge.

STATEMENT.

We have already stated the issues of fact to be passed upon in the declaration, and refer the court to this. Also what the petition sets out in the record herein, pp. 2 to 3.

Defendant's sworn plea denying the truth of the allegations as to value is set out on pages 9 and 10 of the record; its answer on pp. 11 to 14.

The court's decree is on page 15 and 16 of the record. It will be observed in that decree, that in sustaining defendant's four exceptions to the various claims and items of damages, that the court sums them up and says: "That the measure of damages is the difference between the contract price of oil and *the value of same at the time of the alleged breach thereof.*"

The question then arose as to whether this amounted to more than $2,000.00, leaving out of the consideration that the oil could not be procured at all, at the time it was informed of the breach, and we claim a right to submit this fact to the determination of the jury, which was refused, the court concluding that it was its prerogative to do this and not cognizable by the jury, and in so doing, based its verdict upon a letter of compromise by the plaintiffs, to which defendants objected as is shown more fully in fourth assignment herein set out in bill of exception No. 2, trans. p. 18 and specially on page 28.

It will be noticed also, that the court ignored all allegations and testimony, that the oil could not be secured at any price when the breach was made known to plaintiff. (Trans. .) Also the testimony of Fergueson: "that it was the universal custom for cotton seed oil to be sold on special delivery. The price varying for different deliveries according to supply and demand for the particular delay." (Trans. p. 27.)

There were many other matters of fact that showed any thing else than a clear case of jurisdiction, to which a jury would have a right to consider.

REMARKS.

In arriving at a conclusion as to whether the court has jurisdiction, there are many things to consider and it is not absolutely required that the oil should have been worth 20c. per gallon at the time of breach, nor that it was worth that at the time plaintiff was informed of same. It may have probably have been so, or that plaintiff thought so in good faith when he brought suit, or it may be that the oil could not be procured at that time at any price. In either event, plaintiff had the right to have a jury to pass on these matters rather than a judge who was calculated to take a view from a jury, of the facts, whether more accurate is not for us to say. True, he may have the right to set aside the verdict of the jury on this point, but this would not give him the right to usurp the prerogative of a jury, as understood by the laws of this country. The constitution of the United States and Texas, both provide for a jury in cases where matters of fact are to be determined.

True, Sec. 5 of the Acts of 1875, required the Circuit Court to dismiss a suit whenever it shall appear to its satisfaction, that the suit does not really and substantially involve a dispute of controversy within the jurisdiction of the court. It is said in the case of Blackley vs. Davis, 1 McLean, U. S., 412, that the questions of fact is usually tried by a jury. In the case of Wetmore vs. Rymer, 169 U. S. 117. It seems that this court held that, that section was repealed by the Act of March 3rd, 1887, and of Feb. 25th, 1889. Then in 1891, (26 Stat. at L., 826, Chap. 517,) provide that the Supreme Court has jurisdiction to review any final decree in any case in which the jurisdiction of the trial court is in issue, and unless it appears that as a matter of law, the court can say that it has not jurisdiction, we had a right to have it passed upon by a jury. This court, delivering its opinion in that very interest-

ing and carefully prepared opinion in the above case of Wetmore vs. Rymer, 169 U. S., p. 119, uses on this point the following language: "Undoubtedly the general rule is that upon a writ of error only matters of law appearing on the face of the record can be considered, and that evidence, whether written or oral, and whether given to the court or to the jury, does not become a part of the record unless made so by some regular proceeding at the time of the trial before the rendition of the judgment. Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdictisn according to the course of the common law; and ordinarily a bill of exception lies only upon some point arising either upon the admission or rejection of evidence, or is a matter of law arising from a fact found, or not denied, and which has been overruled by the court. Continuing in this opinion, it is shown that under the act of 1875, the trial court was not bound to the pleadings but could go outside of them, but that being repealed, holding further that while in *equity* cases the range would be greater, in cases at *law* the judgment must be based upon the verdict of a jury *or upon facts found in an agreed statement.*

Holding further that the Statute does not prescribe any particular mode in which the question of jurisdiction is to be brought to the attention of the court, nor how, when raised, shall be determined. The court proceeded further on the latter part of page 120, saying that the trial court might submit the issues to the jury, and then upon the admission of evidence or charge of the court submit errors committed to the Supreme Court.

Continuing the court is requested to read carefully the above case, as the principles announced, are pertinent to the one at bar.

Now as to the right of trial by jury, we cite Art. 7 of the United States Constitution, also Art. 914 of United States Revised Statutes, which provides that the practice, pleadings and modes of proceedures in the Circuit Court shall be the same as in the state where the circuit court is held. Now the Texas Constitution provides that:

"That the right of trial by jury shall remain inviolate." Art. 1, Sec. 15, State Cons.

The Statutes of the State specially provide for jury to determine all questions of facts.

Art. 648 of the U. S. Rev. Stat. provides: "that the trial of issues of fact *shall be by a jury.*" Art. 649, however, provides: parties may waive a jury. This was not done in this case.

FOURTH ASSIGNMENT OF ERROR.

The court erred in its ruling as set fourth in bill of exception No. 2, wherein it admitted in evidence the letter and statement set out in said bill, and considered same as conclusive of the amount of damage, or amount of loss to which plaintiff would be entitled to recover.

STATEMENT.

By reference to page 23,(original print 30) of Transcript will be found the letter, then following on next page is the statement in question. This letter and statement was objected to on the following grounds:

1st. That same was in the nature of a compromise and that this was shown by the depositions of witness thereon filed herein and set out hereafter in this bill of exception and was not intended and did not operate as conclusive of the amount of damage to which plaintiff was entitled.

2nd. Because the same did not conclude the plaintiff from claiming other and further damage in case same was not accepted.

3rd. Because the same did not comprehend the true basis or measure of damages.

But the court overruled said objections and admitted and considered said testimony."

The only testimony offered on the subject of this letter was that of Louis K. Ferguson, President of the Company whose testimony set out in this same bill of exception on page 25 of trans. (beginning at p. 32 of original print,) that part relating to this letter and statement begins at the top of page 28 of the trans. and takes up two-thirds of that page and the court is specially asked to read same, as it shows that same was in the nature of a compromise settlement. This testimony as shown was taken in May 1900 (trans. 25) 18 months before the exceptions were filed to plaintiff's original petition, or in fact any plea had been filed by the defendant.

The common law holds that no proposition on compromise shall be offered in evidence. It is also the law in Texas, well settled as against public policy, as compromises tend to discourage law suits, to offer this character of testimony.

ARGUMENT.

If the court considered the testimony at all it must have held same to be conclusive of lack of jurisdiction, for according to this the damage would not reach $2,000.00. If it was considered at all same was in violation of a well settled doctime of Texas which forbids the use of matter offered in compromise. Piaintiff so, testified and said it did not pretend to comprehend the damages suffered. The defendant offered no verbal testimony. Plaintiff offered abundant testimony that this was not all the damages, the court usurped the preroga-

tive of the jury and refused to allow plaintiff a jury. The testimony of the only sworn witness showed that the amount of oil contracted for was ten tanks of a capacity of 49,500 to 50,000 pounds. The only testimony as to the capacity was that the plaintiff had to pay freight on tanks at the rate of 50,000 pounds per tank (trans. 26) and the contract, contemplated this amount, this was equal to 6,666⅔ gallons per tank. There being seven tanks and 1153 gallons short on other tanks equal in all 47,820 gallons this at a profit of 4¼ cents per gallon (being 20c per gallon) aggregates $2032.30 at ¼ cent less we have $1912.80 at ½ cent less equals $1793.20.

Now add this to any of the other items of damage that was excluded from consideration by the court sustaining exceptions of defendant and we would have far over the $2,000.00. Or considering the allegations in the petition and the positive proof thereon to the effect that at the time plaintiff was informed of the breach he could not secure the oil at any price and that the facts alleged and proved that these were to be specific deliveries, and that time was of the essence of the contract, and we have a case that goes far over $2,000.00 in damages.

We take it that the case above referred to (Wetmore vs. Rymer) on page 122 of 169 U. S., which holds that the trial court shall be "*satisfied*" means that the facts create a legal certainty, that is, an absolute certainty that it has no jurisdiction.

AUTHORITIES.

63 Tex. 276.
1st. Jones on Ev., Sec. 293.

FIFTH ASSIGNMENT OF ERROR.

The court erred in its fiindings and rulings as shown in bill of exception Nos. 2 and 3 wherein it held that the evidence showed conclusively that the court had not jurisdiction of this

suit and the matter in controversy did not exceed $2,000.00 and in considering the matters set out in letter of Sept. 11, 1897, and that the allegations for more than that sum, were fraudulently made to confer jurisdiction.

STATEMENT.

To prevent repetition we here specially refer the court to our statement and argument under the fourth assignment.

We also call attention to our statement and argument under first and 3rd assignments, p. hereof, and to the general or introductory statement, p. hereof.

If we conclude that the oil would cost 20c. per gallon, we have a difference of more than $2,000.00, and there was proof of this fact. By reference to Trans. p. 26, the witness says: "On Sept. 13th, 1897, we paid 20c. for a lot of oil at Memphis, the rate of freight from Memphis rules one cent per gallon less than in Texas, etc," which would make this oil equal to 18½ to 19 cents in Texas, although, as we have stated we could not get the oil in Texas at that price. The burden of proof was on defendant to show want of jurisdiction.

The letter of defendant, Sept. 2nd, 1897, Trans. p. 26, shows that the defendant refused to sell them at 18½ cents, and had none to sell at that price, sale, if at all, to be "conditioned on seed receipts, and no change in the market." Witness says further: "It is the universal custom for cotton seed oil to be sold on special delivery. The price for different deliveries varying according to the supply and demand for the particular delivery. We made the contract with Landa for five tanks in August, and five tanks the first half of September, so we could make a contract for refined oil based on this delivery of crude oil allowing what time was needed to get the oil from New Braunfels to Louisville, Ky. At the time that the defendant refused to deliver us the oil as stated, there was little oil offering for the reason that the mills were advancing the price

of seed on each other, and we could not get anything like the amount of crude oil for shipment, that we could dispose of as refined oil. The oil for prompt shipment was very scarce, and the mills were inclined to sell for future delivery." Witness says that the plaintiff was for first time informed by letter on the 14th of Sept., 1897, of the brearh. (Trans. p. 27.) With this letter from the defendant on Sept. 2nd, he refused to sell at 18½ cents, and the proof unquestioned of the fact that the price continued to rise, and plaintiff had to pay 20c. for it at Memphis, and could not get it at all in Texas. It seemed a little extraordinary that the court could have found plaintiff to have made a fraudulent allegation under such circumstance and that it should be able to hold, beyond a doubt, that theoil, to-wit: 47820 gallons at probably 20c., if to be had at all, and in Texas not at all, was fraudulent and justified the court to dismiss the suit, and this as a *matter of law*.

AUTHORITIES.

Witmore vs. Rymer, 169 U. S., 120.
Hartoz vs. Memory, 116 U. S., 588.
Dwyer vs. Bosset, 63 Tex., 274.
Chatham vs Jones 69 Tex., 745.

SIXTH ASSIGNMENT OF ERROR.

The court erred in rendering judgment and dismissing the cause for want of jurisdiction and for costs of court, when it should have submitted the whole matter to a jury upon its merits.

STATEMENT.

This assignment brings in review the right of the court to sustain the special demurrers and also its arbitrary course in refusing a jury and dismissing the case, because it concluded that the amount on the one issue on which it heard testimony,

to-wit: difference in contract price and the price at the time of the breach of contract, was insufficient to give it jurisdiction. It appearing from the petition that the oil could not be had at all at time of breach. The court ignoring the contention altogether and holding us to the rule of difference of prices as aforesaid, whether the goods could be obtained or not. Now we say that this Honorable Court shoul review the rulings of the trial court, to see if the petition stated a cause of action, safe against the special demurrers of defendant; that is, do any of the special damages besides that upon which the court heard the evidence state matter upon which the plaintiff had a right to be heard? and if so, we have a right to have the cause remanded for that purpose, and if it was probable or possible that the issue trial would go over $2,000.00, we also contend that we have a right to have a jury to determine the issues of fact set up.

And of these matters herein we most respectfully submit to the consideration of the Honorable Supreme Court of the United States.

C. W. Ogden
J. D. Simms

Attorneys for Plaintiff in Error.

Supreme Court of the United States.

No. 241.—October Term, 1902.

The Globe Refining Company, Plaintiff in Error, *vs.* The Landa Cotton Oil Company. } In error to the Circuit Court of the United States for the Western District of Texas.

[June 1, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action of contract brought by the plaintiff in error, a Kentucky corporation, against the defendant in error, a Texas corporation, for breach of a contract to sell and deliver crude oil. The defendant excepted to certain allegations of damage, and pleaded that the damages had been claimed and magnified fraudulently for the purpose of giving the United States Circuit Court jurisdiction, when in truth they were less than two thousand dollars. The judge sustained the exceptions. He also tried the question of jurisdiction before hearing the merits, refused the plaintiff a jury, found that the plea was sustained and dismissed the cause. The plaintiff excepted to all the rulings and action of the court, and brings the case here by writ of error. If the rulings and findings were right there is no question that the judge was right in dismissing the suit, *North American Transportation & Trading Co.* v. *Morrison*, 178 U. S. 262, 267, but the grounds upon which he went are re-examinable here. *Wetmore* v. *Rymer*, 169 U. S. 115.

The contract was made through a broker, it would seem by writing, and at all events was admitted to be correctly stated in the following letter:

"Dallas, Texas, 7/30/97.

Landa Oil Company, New Braunfels, Texas.

Gentlemen: Referring to the exchange of our telegrams to-day, we have sold for your account to the Globe Refining Company, Louisville, Kentucky, ten (10) tanks prime crude C/S oil at the price of 15¾ cents per gallon of 7½ pounds f. o. b. buyers' tank at your mill. Weights and quality guaranteed.

Terms: Sight draft without exchange b/ldg. attached. Sellers paying commission.

Shipment: Part last half August and balance first half September. Shipping instructions to be furnished by the Globe Refining Company.

Yours truly,

Thomas & Green, *as Broker.*"

Having this contract before us, we proceed to consider the allegations of special damage over and above the difference between the contract price of the oil and the price at the time of the breach, which was the measure adopted by the judge. These allegations must be read with care, for it is obvious that the pleader has gone as far as he dared to go and to the verge of anything that could be justified under the contract, if not beyond.

It is alleged that it was agreed and understood that the plaintiff would send its tank cars to the defendant's mills, and that the defendant promptly would fill them with oil, (so far simply following the contract,) and that the plaintiff sent tanks. "In order to do this the plaintiff was under the necessity of obligating itself unconditionally to the railroad company (and of which the defendant had notice) to pay to it for the transportation of the cars from said Louisville to said New Braunfels in the sum of nine hundred dollars," which sum plaintiff had to pay, "and was incurred as an advancement on said oil contract." This is the first item. The last words quoted mean only that the sum paid would have been allowed by the railroad as part payment of the return charges had the tanks been filled and sent back over the same road.

Next it is alleged that the defendant, contemplating a breach of the contract, caused the plaintiff to send its cars a thousand miles, at a cost of a thousand dollars; that defendant cancelled its contract on the second of September, but did not notify the plaintiff until the fourteenth, when, if the plaintiff had known of the cancellation, it would have been supplying itself from other sources; that plaintiff (no doubt defendant is meant) did so wilfully and maliciously, causing an unnecessary loss of two thousand dollars.

Next it is alleged that by reason of the breach of contract and want of notice plaintiff lost the use of its tanks for thirty days—a loss estimated at seven hundred dollars more. Next it is alleged that the plaintiff had arranged with its own customers to furnish the oil in question within a certain time, which contemplated sharp compliance with the contract by the defendant, "all of which facts, as above stated, were well known to the defendant, and defendant had contracted to that end with the plaintiff." This item is put at seven hundred and forty dollars, with a thousand dollars more for loss of customers, credit and reputation. Finally, at the end of the petition it is alleged generally that it was known to defendant and in contemplation of the contract that plaintiff would have to send tanks at great expense from distant points, and that plaintiff "was required to pay additional freight in order to rearrange the destination of the various tanks and other points." Then it is alleged that, by reason of the defendant's breach, the plaintiff had to pay three hundred and fifty dollars additional freight.

Whatever may be the scope of the allegations which we have quoted, it will be seen that none of the items was contemplated expressly by the words of the bargain. Those words are before us in writing, and go no further than to contemplate that when the deliveries were to take place the buyer's tanks should be at the defendant's mill. Under such circumstances the question is suggested how far the express terms of a writing, admitted to be complete, can be enlarged by averment and oral evidence, and if they can be enlarged in that way, what averments are sufficient. When a man commits a tort he incurs by force of the law a liability to damages, measured by certain rules. When a man makes a contract he incurs by force of the law a liability to damages, unless a certain promised event comes to pass. But unlike the case of torts, as the contract is by mutual consent, the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured. The old law seems to have regarded it as technically in the election of the promisor to perform or to pay damages. *Bromage* v. *Genning*, 1 Roll. R. 368; *Hulbert* v. *Hart*, 1 Vern. 133. It is true that as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter. But a man never can be absolutely certain of performing any contract when the time of performance arrives, and in many cases he obviously is taking the risk of an event which is wholly or to an appreciable extent beyond his control. The extent of liability in such cases is likely to be within his contemplation, and whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind. For instance, in the present case the defendant's mill and all its oil might have been burned before the time came for delivery. Such a misfortune would not have been an excuse, although probably it would have prevented performance of the contract. If a contract is broken the measure of damages generally is the same, whatever the cause of the breach. We have to consider therefore what the plaintiff would have been entitled to recover in that case, and that depends on what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made.

This point of view is taken by implication in the rule that "a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract." *Grebert-Borgnis* v. *Nugent*, 15 Q. B. D. 85, 92; *Horne* v. *Midland Ry. Co.*, L. R. 7 C. P. 583, 591; *Hadley* v. *Baxendale*, 9 Exch. 341, 354; *Western Union Telegraph Co.* v. *Hall*, 124 U. S. 444, 456; *Howard* v. *Stillwell & Bierce Manufacturing Co.*, 139 U. S. 199,

206; *Primrose* v. *Western Union Telegraph Co.*, 154 U. S. 1, 32. The suggestion thrown out by Bramwell, B., in *Gee* v. *Lancashire & Yorkshire Ry. Co.*, 6 H. & N. 211, 218, that perhaps notice after the contract was made and before breach would be enough, is not accepted by the later decisions. See further *Hydraulic Engineering Co.* v. *McHaffie*, 4 Q. B. D. 670, 674, 676. The consequences must be contemplated at the time of the making of the contract.

The question arises then, what is sufficient to show that the consequences were in contemplation of the parties in the sense of the vendor taking the risk? It has been held that it may be proved by oral evidence when the contract is in writing. *Messmore* v. *New York Shot & Lead Co.*, 40 N. Y. 422. See *Sawdon* v. *Andrew*, 30 Law Times, N. S., 23. But, in the language quoted, with seeming approbation, by Blackburn, J., from Mayne on Damages, 2d ed. 10, in *Elbinger Actien-Gesellschaft* v. *Armstrong*, L. R. 9 Q. B. 473, 478, "it may be asked, with great deference, whether the mere fact of such consequences being communicated to the other party, will be sufficient, without going on to shew that he was told that he would be answerable for them, and consented to undertake such a liability?" Mr. Justice Willes answered this question, so far as it was in his power, in *British Columbia Saw-Mill Co.* v. *Nettleship*, L. R. 3 C. P. 499, 500: "I am disposed to take the narrow view that one of two contracting parties ought not to be allowed to obtain an advantage that he has not paid for. . . . If [a liability for the full profits that might be made by machinery which the defendant was transporting, if the plaintiff's trade should prove successful and without a rival] had been presented to the mind of the ship owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it. And though he knew from the shippers the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." The last words are quoted and reaffirmed by the same judge in *Horne* v. *Midland Ry. Co.*, L. R. 7 C. P. 583, 591; *S. C.*, L. R. 8 C. P. 131. See also Benjamin, Sale, 6th Am. ed. § 872.

It may be said with safety that mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law to charge the seller with special damage on that account if he fails to deliver the goods. With that established we recur to the allegations.

With regard to the first it is obvious that the plaintiff was free to bring its tanks from where it liked—a thousand miles away or an adjoining yard—so far as the contract was concerned. The allegation hardly amounts to saying that the defendant had notice that the plaintiff was likely to send its cars from a distance. It is not alleged that the defendant had notice that the plaintiff had to bind itself to pay nine hundred dollars, at the time when the contract was made, and it nowhere is alleged that the defendant assumed any liability in respect of this uncertain element of charge. The same observations may be made with regard to the claim for loss of use of the tanks and to the final allegations as to sending the tanks from distant points. It is true that this last was alleged to have been in contemplation of the contract, if we give the plaintiff the benefit of the doubt in construing a somewhat confused sentence. But having the contract before us we can see that this ambiguous expression cannot be taken to mean more than notice, and notice of a fact which would depend upon the accidents of the future.

It is to be said further with regard to the foregoing items that they were the expenses which the plaintiff was willing to incur for performance. If it had received the oil these were deductions from any profit which the plaintiff would have made. But if it gets the difference between the contract price and the market price it gets what represents the value of the oil in its hands, and to allow these items in addition would be making the defendant pay twice for the same thing.

It must not be forgotten that we are dealing with pleadings, not evidence, and with pleadings which, as we have said, evidently put the plaintiff's case as high as it possibly can be put. There are no inferences to be drawn, and therefore cases like *Hammond* v. *Bussey*, 20 Q. B. D. 79, do not apply. It is a simple question of allegations which, by declining to amend, the plaintiff has admitted that it cannot reinforce. This consideration applies with special force to the attempt to hold the defendant liable for the breach of the plaintiff's contract with third persons. The allegation is that the fact that the plaintiff had contracts over was well known to the defendant, and that "defendant had contracted to that end with the plaintiff." Whether, if we were sitting as a jury, this would warrant an inference that the defendant assumed an additional liability, we need not consider. It is enough to say that it does not allege the conclusion of fact so definitely that it must be assumed to be true. With the contract before us it is in a high degree improbable that any such conclusion could have been made good.

The only other allegation needing to be dealt with is that the defendant maliciously caused the defendant to send the tanks a thousand miles, contemplating a breach of its contract. So far as this item has not been answered by what has been said, it is necessary only to add a few words.

The fact alleged has no relation to the time of the contract. Therefore it cannot affect the damages, the measure of which was fixed at that time. The motive for the breach commonly is immaterial in an action on the contract. *Grand Tower Co.* v. *Phillips*, 23 Wall. 471, 480; Wood's Mayne on Damages, § 45; 2 Sedgwick, Damages, 8th ed. § 603. It is in this case. Whether under any circumstances it might give rise to an action of tort is not material here. See *Emmons* v. *Alvord*, 177 Mass. 466, 470.

The allowance of the exceptions made the trial of the plea superfluous. If the question of fact was to be tried as to whether the amount of damages that fairly could be claimed was sufficient to give the court jurisdiction, the court had authority to try it. *Wetmore* v. *Rymer*, 169 U. S. 115, 121; Act of March 3, 1875, c. 137, § 5, 18 Stat. 472. In coming to his conclusion, apart from what was apparent on the face of the pleadings, the judge no doubt was influenced largely by a letter from the plaintiff to the defendant, enclosing an itemized bill for one thousand and twenty-one dollars and twenty-eight cents. This letter suggested no further claim except for "any additional mileage we may have to pay." Of course, if the judge accepted the plaintiff's own view of its case as expressed here, the pretence of jurisdiction was at an end. Some attempt was made to make out this was an offer of compromise, and inadmissible. But the letter did not purport to be anything of the sort, it was an out and out adverse demand.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

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